Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID P. ADAM ET AL., PETITIONERS

v.

KEN SALAZAR, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the burden of proof in an ADEA disparate-impact claim is on the plaintiffs, rather than the defendants as held in *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505, 128 S. Ct. 2395 (June 19, 2008).

II. Whether each plaintiff in a RIF must present **additional** direct evidence of age discrimination, after finding direct evidence of age discrimination for two of the plaintiffs and "the existence of a culture of age-based discriminatory animus in the Geological Division".

III. Whether bifurcation of discrimination claims from "non discrimination" claims such as violations of the RIF regulations denies *de novo* review required by 5 U.S.C. Section 7703(b) of the Civil Service Reform Act.

PARTIES TO THE PROCEEDING

Petitioners

David P. Adam, Lanford H. Adami, Bela Csejtey, Jr., Alice S. Davis, James L. Drinkwater, Arthur B. Ford, Arthur Grantz, Barry F. Hirshorn, H. Mahadeva Iyer, Chi-yu King, Stephen L. Lewis, Allan G. Lindh, Dennis M. Mann, A. Thomas Ovenshine were employee of the respondent, U.S. Department of Interior U.S. Geologic Survey, Geologic Division (hereafter "USGS") at the time of the RIF in October 1995.

Respondent

Ken Salazar, Secretary for the U.S. Department of Interior, in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners David Adam *et al.* respectfully request the court to grant their petition for a writ of certiorari, and review the judgment of the United States Court of Appeals for the Ninth Circuit, filed September 9, 2008, or alternatively, vacate and remand the case in light of *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505, 128 S. Ct. 2395 (2008).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is not published is attached hereto at (Pet. App. 1a-15a). The District court's Findings and Conclusions which is not published is attached hereto at (Pet. App. 16a-66a) The Panel's decision denying the Petition for Rehearing En Banc which is not published is attached hereto at (Pet. App. 67a-68a).

JURISDICTION

The decision of the court of appeals was entered on September 9, 2008. Pet. App. 1-15a. A timely petition for rehearing en banc was denied on November 11, 2008. Pet. App. 67a-68a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

29 U.S.C. § 623(a)

> It shall be unlawful for an employer . . . to . . . discriminate against any individual with respect

to his compensation, terms, conditions, or privileges of employment because of such individual's age. . . .

5 U.S.C. § 7703

(b)(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e16 (c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a (c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216 (b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

. . . .

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation

having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant **shall have the right to have the facts subject to trial *de novo* by the reviewing court**.

STATEMENT

Petitioners, all over age 40, were scientists in the Geologic Division of the U.S. Geological Survey who were separated due to a reduction in force (hereafter "RIF") on October 15, 1995. The RIF involved elimination of 550 scientists, 37% of the workforce in the Geologic Division of the U.S. Geological Survey (hereafter "USGS") for non-performance reasons.

When he was hired, plans for the future of the USGS were given to the new USGS Director, Gordon Eaton, in a report entitled "A Vision for the 21st Century", which stated:

> This discussion [on recruitment] presupposes that a plan will be developed to allow for the hiring of new, young workers. Some segments of the USGS currently are suffering from an aging, high-grade workforce that has limited the organization's financial flexibility and restricted the influx of new ideas and talents. An aging workforce is a critical problem that must be addressed earnestly and creatively before any

strategic recruitment plan can be implemented." Pl. Ex. 7 at 10.

(Pet. App. 18a-19a) The District court found:

> The Transition Team report thus expresses the USGS's legitimate concern that too many of its employees were highly experienced scientists and too few of its employees were less experienced scientists and technical support staff. However, the Transition Team Report goes beyond this legitimate concern to explicitly express concern with the age of the USGS's workers. Pl. Ex. At 10 ("[s]ome segments of the USGS currently are suffering from an aging, high-grade workforce"; "[a]n aging workforce is a critical problem"). Nor can the Transition Team's report's references to age be considered to be merely a proxy for experience, because the Transition Team report discusses age and experience as separate characteristics. Pl. Ex. 7 at 10. ("a healthy distribution of age, grade, and skills"; "an aging, high-grade workforce"). Thus the Transition Team's Report strongly suggests that many USGS managers and employees were aware that the USGS, and particularly the Geologic Division, had an aging workforce and believed that this had negative implications for the future of the USGS. Further, the Transition Team report was relied upon by USGS management in planning change. Eaton TR 809.

(Pet. App. 19a)

Most of the Petitioners were Geologists with lengthy and successful careers. There research projects were listed in the Program Plans and many were current Project Chiefs, responsible for high priority projects. (Pet. App. 22a-25a, 43a-57a) David Adam, Global Change and Climate History Program and National Marine and Coastal Geology Program researched climate history by analyzing spore cores from the Klammath Basin. USGS built a state-of-the-art pollen extraction laboratory with a refrigerated core storage unit set to be completed in the fall of 1995. (Pet. App. 56a-57a) There was no one in Menlo Park, California to do the work after the RIF and the laboratory was torn out. Steve Lewis, National Marine and Coastal Geology Program, researched earthquake hazards on the continental margins of the western U.S. and southern Pacific ocean. (Pet. App. 43a-44a) Allan Lindh, Office of Earthquake, Volcanoes, and Engineering, a position focused on earthquake prediction within the San Andreas fault system. (Pet. App. 46a-47a) Bela Csejtey, Office of Mineral Resources, Denali National Park Mapping Project Chief. (Pet. App. 52a-53a) A. Thomas Ovenshine, Office of Mineral Resources, International Minerals Program Advisor. (Pet. App. 55a) Arthur Grantz, Office of Mineral Resources, Project Chief of the Climate History of the Western Arctic Ocean Basin, which was funded by the Global Change and Climate History Program and National Marine and Coastal Geology Program. (Pet. App. 56a-57a) In June 2005, one hundred positions were "added back" into the staffing plan without going through the RIF process, including a physical science technician position to which Lanford Adami had bumping rights. (Pet. App. 44a-45a) Fifty of the positions were held as vacancies, in violation of the

RIF rules.

Petitioners filed timely "mixed case" appeals to the U.S. Merit Systems Protection Board (MSPB) under the Civil Service Reform Act (CSRA), 5 U.S.C. §7703(b). They complained that the RIF was designed and implemented in a manner that had an unlawful disparate impact on older employees and their positions were targeted, younger employees were selected for positions for which they had superior rights, and/or the justifications given were suspect. They presented evidence of age discrimination based on direct evidence, disparate treatment, disparate impact[1] and pretext evidence. After fully exhausting administrative appeals, they filed a District court complaint under the Age Discrimination in Employment Act (hereafter "ADEA"), 29 U.S.C. 633(a). The USGS filed three separate motions for summary judgment. The District court bifurcated the violations of CSRA from the discrimination claims, granting summary judgment for USGS on the violations of CSRA or so-called "non-discrimination" claims. A bench trial was held on July 1-9, 2003 on the discrimination claims. Numerous violations of the CSRA and RIF regulations were not considered de novo by the district court, but rather

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[1] At the MSPB hearing, Petitioners presented the testimony of Paul Switzer, Professor of Statistics at Stanford University, who demonstrated using both his own methodology and the "logistic regression" analysis used by Agency witness Dr. V.A. Samaranayake, that the statistical correlation between age and the probability of being RIFed is "as plain as the nose on one's face" (Declaration of Dr. Switzer of October 08, 1997). For All Permanent Staff of the Geologic Division the p-value for Age is 6/10,000. For the Permanent Professional Staff of the Geologic Division the p-value is less than 1/1,000,000.

were given short shrift, based on the deferential review of the MSPB record.

At trial, USGS claimed that the burden of proof for the disparate impact claims was on the Appellants to disprove "business necessity". The burden of proof was placed on Petitioners by the district court:

> To prevail on their disparate impact claim, Plaintiffs must 'isolate[e] and identify [] the specific employment practices that are allegedly responsible for any observed statistical disparities.' *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656 (1989).

(Pet. App. 63a) At trial, Lepowsky testified that Dr. Switzer's statistical analysis was correct. [2] Lepowsky testified that the fact that the p-values are extremely small is strong evidence that the observed relationship between age and the probability of being RIF'd is not mere happenstance. Mr. Lepowsky translated the p-value of Dr. Switzer's calculations to 4.75 standard deviations, using a one-tailed test, (or 4.89 standard deviations, using a two-tailed test). Dr. Palmer,

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[2] The district court's finding that the plaintiff's statistical analysis failed to provide any meaningful evidence because it did not take into account the type of work performed by each employee ignores the fact that the full statistical analysis was precluded at the district court. 5 C.F.R. §351.505 (1995) provides that "each agency shall preserve intact all registers and records relating to an employee for at least one year from the date the employee is issued a specific notice." USGS personnel destroyed all notes taken during Round I and Round II discussions by placing them in a shredder at the end of each day. Ninth Circuit Excerpts of Record, p. 0037:3-4, 8-10, USGS Answer -1st Am.Complaint.

defendant's statistical expert, agreed that age was shown to be statistically significant, even using his methodology.

Based on the statistical evidence, the trial court held that "older workers were more likely to have been negatively affected by the RIF than younger workers. (Pet. App. 41a) However, the district court went on to hold "if it is the RIF as a whole that is alleged to have had a disparate impact, then Defendant can rebut Plaintiff's disparate impact claim by demonstrating a legitimate business reason for conducting the RIF." (Pet. App. 62a-64a)

The District court's final judgment was entered in favor of cross-appellants James P. Calzia and Chester T. Wrucke on their ADEA disparate treatment claims.[3] The District court dismissed ADEA disparate impact claims of all of the petitioners, as well as their ADEA

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[3] The district court's order provided in relevant part:

> However, with respect to Plaintiffs Calzia and Wrucke, there is evidence that the actions of the relevant decision maker, Ron Worl, were tainted with age-based discriminatory animus, in that Worl acted to protect younger workers from the RIF. Further, Defendant's explanation for the decisions to terminate Plaintiffs Calzia and Wrucke are not worthy of credence. Based on this evidence, **viewed in combination with the evidence of the existence of a culture of age-based discriminatory animus in the Geologic Division**, the Court finds in favor of Plaintiffs Calzia and Wrucke on their disparate treatment claims. [Emphasis added]

(Pet. App. 61a) The findings of the discriminatory animus was not applied to the other twelve plaintiffs.

disparate treatment and Title VII retaliation claims on September 30, 2004. (Pet. App. 61a)

Petitioners appealed on the entry of summary judgment on the CSRA and Title VII discrimination and the entry of judgment on the ADEA and Title VII retaliation claims. USGS cross-appealed on the calculation of damages for Calzia and Wrucke. (Pet. App. 3a)

In their brief and during oral argument on June 19, 2007, the USGS admitted that in disparate impact claims in age discrimination cases the burden of proof is on the employer to prove "reasonable factors other than age" ("RFOA"), as *Criswell v. Western Airlines*, 709 F.2d 544 (9th Cir. 1983) was controlling law in the Ninth Circuit. Because the district court applied the "business necessity test " used in Title VII cases, the government suggested that the case be remanded to the District court. On March 17, 2008, the panel issued an order deferring submission of the case pending the issuance of an opinion in *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505. (Pet. App. 69a)

Meacham v. Knolls Atomic Power Laboratory, No. 06-1505, 128 S. Ct. 2395 (June 19, 2008) held that "the business necessity test should have no place in ADEA disparate-impact cases." The *Meacham* Court held that an employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" (RFOA) affirmative defense under 623(f)(1).

Two circuit judges, Pamela Rymer and Sidney R. Thomas, affirmed with a concurrence and dissent from Judge Stephen Reinhardt. (Pet. App. 1a-13a, 14a-15a) The panel held that the district court properly applied deferential review to the employees CSRA claims under 5 U.S. C. § 7703.

The majority rejected petitioner's argument that the district court erred by not applying the mixed-motive analysis in *Costa v. Desert Palace, Inc.*, 539 U.S. 90 (2003). "The mixed-motive analysis is only applicable, however, when "a protected characteristic was 'a motivating factor' in the employment action." (Pet. App. 5a-6a) Judge Reinhardt dissent from Part I.B. stated:

> Because the record in this case contains ample evidence of an officially sponsored culture of age based discrimination at USGS, I would reach the merits of the employees' mixed-motive claim and find discrimination in violation of the ADEA.

(Pet. App. 15a) A timely petition for rehearing was filed. The panel again 2-1 voted to deny rehearing. (Pet. App. 67a-68a)

REASONS FOR GRANTING THE PETITION

A. THE COURT SHOULD VACATE AND REMAND DECISION ON THE DISPARATE IMPACT IN LIGHT OF *MEACHAM v. KNOLLS ATOMIC POWER LABORATORY.*

In *Smith v. City of Jackson,* 544 U.S. 288 (2005) the Supreme Court held that the disparate impact theory was available under the ADEA. The split in the Circuits regarding who had the burden of proof was resolved in *Meacham v. Knolls Atomic Power Lab*, No. 06-1505, 128 S. Ct. 2395 (June 19, 2008). Under the ADEA, An employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" (RFOA) affirmative defense under 29 U.S.C. §623(f)(1). The majority further found that the "business necessity test" used in Title VII cases has no place in ADEA disparate impact cases.

The Ninth Circuit upheld the District court's articulation of the requirements to establish a *prima facie* case of disparate impact:

> To establish a *prima facie* case of disparate impact violation of the ADEA, am employee must: '(1) show a significant disparate impact on a protected class or group; (2) identify the specific employment practices or selection criteria at issue; and (3) show a causal relationship between the challenged practices or criteria and the disparate impact.' *Hemmings v.*

> *Tidyman's Inc.*, 285 F.3d 1174, 1190 (9th Cir. 2002)."

(Pet. App. 7a) (Pet. App. 62a) Under the ADEA disparate impact theory, there is no requirement for employees to establish a discriminatory motive, nor to rebut the "business necessity" asserted by the employer.

Petitioners established the *prima facie* case by proving that the RIF had a statistically significant impact on older employees, based on the statistical evidence, the trial court held that:

> Plaintiffs presented evidence that, even after the employees' grade and performance are taken into account, older workers were more likely to have been negatively affected by the RIF than younger workers. Lepowsky TR 465, 467-68.

(Pet. App. 41a) For the Permanent Professional Staff of the Geologic Division the p-value is less than 1/1,000,000.

Under Ninth Circuit law, the panel held that "We have held that a reduction in force may constitute a specific employment practice. *Pottenger v. Potlatch Corp.*, 329 F3d 740, 749 (9th Cir. 2003)". (Pet. App, 7a) Petitioners identified the specific employment practices or selection criteria at issue, namely, the nationwide RIF. The causal connection between the RIF and the effect on the Petitioners is that they were separated and replaced by younger employees and/or excluded from consideration for other positions which remained.

However, the Ninth Circuit erroneously affirmed the district court's placement of the burden to prove "business necessity" on the Petitioners and ignored the longstanding Ninth Circuit precedent established in *Criswell v. Western Airlines*, 709 F.2d 544 (9th Cir. 1983). The District court held:

> Plaintiffs have not identified any other course of action that Defendant could have taken that would have reduced the Geologic Division's salary obligations enough to generate the operating funds that it needed to meet its programmatic goals.

(Pet. App. 64a) The Ninth Circuit affirmed that ruling, which (Pet. App. 13a, note 2) The decision should be vacated and remanded.

B. PETITIONERS SHOULD NOT EACH BE REQUIRED TO PRESENT ADDITIONAL DIRECT EVIDENCE OF AGE DISCRIMINATION.

In *Costa v. Desert Palace, Inc.*, 539 U.S. 90 at 98-101, the Supreme Court unanimously held that a plaintiff need not present direct evidence of discrimination to receive a mixed-motives instruction under section 703(m) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(m). On January 16, 2009, the EEOC issued "Effect of *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), on Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992)", EEOC Directives Transmittal No. 915.002, http://www.eeoc.gov/policy/docs/disparat.html to make

clear it's position.

There is currently a split in the circuits regarding the requirement of direct evidence in ADEA claims in order to receive a mixed-motive instruction. See Amicus Brief of the Solicitor General filed February 2009 in *Gross v. FBL Financial*, Supreme Court No. 08-411, (8th Cir. May 14, 2008) ___ F.3d ___ .

> Nothing in the text of the ADEA imposes a heightened, direct evidence requirement. See, *e.g.*, 29 U.S.C. 623(a)(1) and (2) (employer cannot discriminate 'because of * * * age'). Given the statutory silence on the issue, the '[c]onventional rul[e] of civil litigation' permits the "plaintiff to prove his case 'by a preponderance of the evidence,' * * * using 'direct or circumstantial evidence.'" *Desert Palace*, 539 U.S. at 99 (quoting *Price Waterhouse*, 490 U.S. at 253 (plurality opinion), and *[USPS v.]Aikens*, 460 U.S. [711] at 714 n.3).

The *Gross* decision acknowledged the split in the Circuits. *Rachid v Jack in the Box, Inc.*, 376 F.3d 305 (5th. Cir. 2004) held that the relevant language in the ADEA did not contain a heightened direct evidence standard. *Sprint/United Management Co.* v. *Mendelsohn*, 128 S. Ct. 1140 (2008), the Court held that generally applicable evidentiary rules should be applied to determine the admissibility of evidence of age discrimination by other supervisors.

In this case, the district court found:

> evidence of a culture of age-based discriminatory animus is not sufficient to establish that any particular Plaintiff was adversely impacted during the RIF because of his or her age. Dr. Eaton , the committee that wrote the Transition Team report, and the creator of the "old dog" cartoon RIF meeting notice did not play any role in deciding whether any of the Plaintiffs would be separated during the RIF or whether any of the plaintiffs was entitled to bump or retreat into a different position. The separation decisions were made primarily by the relevant Branch Chiefs, and the bump and retreat decisions were made by a panel of SMEs.

(Pet. App. 60a-61a) However, Judge Reinhardt noted in his dissent:

> At a speech delivered shortly before the round of firings that led to the present case, Dr. Gordon Eaton, the Director of the United States Geological Survey ("USGS") asked his audience: "What is the difference between Jurassic Park and the Geological Division of the Geologic Survey?" The answer: 'One is an amusement part filled with dinosaurs and the other is a movie." A poster announcing an employee meeting to discuss the workforce reduction contained the following cartoon caption: "You gotta help me, Mom . . . This assignment is due tomorrow, and Gramps doesn't understand the new tricks." These 'jokes' by no means reflect the isolated humor of individual USGS

> employees. Rather, a 1993 official report setting forth the agency's "Vision for the 21st Century" explained that "[s]ome segments of the USGS currently are suffering from an aging, high-grade workforce" and that is "a critical problem that must be addressed. . . ."
>
> On this record, I cannot agree with the majority's acquiescence in the district court's finding that "there is *no* evidence that the relevant decision makers were acting in accordance with age-based discriminatory animus." (emphasis added) I would hold that where there is irrefutable evidence of an officially sponsored culture of discrimination in a workplace, it is not necessary to demonstrate that the individual who ultimately undertook the challenged adverse employment action was motivated to do so by his own discriminatory animus. . . . Because the record in this case contains ample evidence of an officially sponsored culture of age-based discrimination at the USGS, I would reach the merits of the employees' mixed-motive claim and find discrimination in violation of the ADEA.

(Pet. App. 14a - 15a) The trial court found this "culture of age-based discriminatory animus" only tainted the RIF of two of the fourteen plaintiffs. One this record, in which direct evidence of discriminatory motive was found at every level of the USGS, the burden should have shifted to defendant. Moreover, the district court found numerous additional specific employment practices which were implemented during the RIF process, to the detriment of petitioners evidencing a

discriminatory motive. Assuming that the statistical evidence before the court did not establish that the RIF had a disparate impact on the older scientists, the direct, circumstantial and pretext evidence contained in the district court findings would be support a finding of age discrimination.

Newly created procedures facilitated the targeting of older employees for elimination. The USGS developed new "competitive level codes" which made over 90% of the positions "unique". This restricted bump and retreat rights. (Pet. App. 33a-34a) The procedures were changed to disallow intra-tenure group bumping, to protect the younger employees. The USGS redefined the definition of "undue interruption", further restricting the bump and retreat rights of the employees, causing their positions to be eliminated from the staffing plan. The managers engaged in a sham review of "staffing plans" and "qualifications", to protect the younger employees from the application of the RIF regulations. Numerous changes were made to the RIF procedures that were unique to the USGS and not in compliance with the CSRA, including restricting "assignment rights", developing a POD system, adding back 100 positions, holding 50% as vacancies to be filled after the RIF took effect, and other procedures which protected the younger employees from bump and retreat rights of the older employees and prevented them from being RIF'd. (Pet. App. 30a-41a) The direct and circumstantial evidence admitted at trial proved age discrimination violations for all twelve employees, not just the two cross-appellees.

C. BIFURCATION OF DISCRIMINATION CLAIMS FROM "NON DISCRIMINATION" CLAIMS, SUCH AS VIOLATIONS OF THE RIF REGULATIONS DENIES *DE NOVO* REVIEW REQUIRED BY 5 U.S.C. SECTION 7703(b)(2) OF THE CIVIL SERVICE REFORM ACT.

In "mixed cases", 5 U.S.C. § 7703 (b)(2) of the Civil Service Reform Act (CSRA) requires a trial *de novo*, not record review of the discrimination issues. A great deal of confusion exists concerning the standard of review of federal sector discrimination cases. As a result of this confusion, evidence needed to show pretext discrimination is frequently excluded from consideration at trial, as happened here. Summary judgment is erroneously granted based on record review of non-discrimination claims, when the violations of civil service issues evidence a discriminatory motive. Circumstantial evidence of the motive of the employer is permitted to prove discrimination. The lack of legitimacy of the employer's actions or mendacity is thereby thwarted.

1. *Employees May Seek De Novo Review of "Mixed Cases" in District Court.*

The CSRA provides that employees may file a discrimination claim in the District Court after exhausting administrative remedies in either the EEOC or the MSPB by filing a "mixed case". 29 C.F.R. Sec. 1614.302(a) defines "mixed case complaint", as follows:

(1) *Mixed case complaint.* A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

A "mixed case" is a case filed by a federal employee in which both discrimination and non-discrimination issues are raised before the MSPB. The non-discrimination claims include a host of other issues, such as procedure errors, substantive violations of federal regulations, and jurisdictional questions. In cases in which discrimination and non-discrimination claims are presented before the MSPB, the plaintiff may seek *de novo* review in district court. See 5 U.S.C. § 7703(b)(2). The district court's review on issues other than discrimination is based on the administrative record, under a deferential standard of review. *See* 5

U.S.C. § 7703(c); *Hayes v. U.S. Gov't Printing Office*, 684 F.2d 137, 141(D.C. Cir. 1982); *Williams v. Dept. of the Army*, 715 F.2d 1485, 1488 (Fed. Cir. 1983); *Romain v. Shear*, 799 F.2d 1416, 1421 n.1 (9th. Cir 1986); *Barnes v. Small*, 840 F.2d 972,979 (D.C. Cir. 1988); *Johnson v. Burnley*, 887 F.2d 471, 474 n.1 (4th Cir. 1989); *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th. Cir. 1993); *Carr v. Reno*, 23 F.3d 525, 528 (D.C. Cir. 1994); *Sloan v. West*, 140 F.3d 1255, 1260 & n.16 (9th Cir. 1998); *Yates v. Merit System Protection Board*, 145 F.3d 1480, 1482 (Fed. Cir. 1998); *Kelliher v Veneman*, 313 F3d 1270 (11th Cir. 2002). If the employee did not file a "mixed case complaint" or the discrimination issues have been waived or abandoned, the Court of Appeals for the Federal Circuit has exclusive jurisdiction over the appeal. See 5 U.S.C. §7703(b)(1).

2. *The Discrimination Claims May Not be Bifurcated.*

In deciding "mixed cases" cases appealed from the MSPB, district courts are required to provide a trial *de novo* on discrimination claims. *See* 5 U.S.C. § 7703(c). *Morales v. MSPB*, 932 F. 2d at 802. This issue in this case is whether CSRA violations involving substantive rights or proof of pretext should be bifurcated and decided on a review of the record. Petitioners maintain the district court must provide trial *de novo* on those issues which are relevant to showing intentional discrimination, including motive and pretext.

Some of the circuits have held when "mixed cases" involving discrimination as well as non-discrimination claims, the appeals are not bifurcated;

instead, the district court has jurisdiction to review both the discrimination and non-discrimination claims. See, *Wiggins v. United States Postal Service*, 653 F.2d 219, 221-22 (5th Cir. 1981); *Christo v. Merit Systems Protection Board*, 667 F.2d 882, 883-85 (10th Cir. 1981); *Chang v. Merit Systems Protection Board*, 677 F.2d 173, 174 (1st Cir. 1982); *Hayes v. United States Government Printing Office*, 684 F.2d 137, 139-40 (D.C. Cir. 1982); *Williams v. Department of Army*, 715 F.2d 1485, 1488-91 (Fed. Cir. 1983) (en banc); *Doyal v. Marsh*, 777 F.2d 1526, 1536, 1536-37 (11th Cir. 1985); *Tolliver v. Dinero*, 790 F.2nd 1394 (9th Cir. 1986); *Gomez v. Department of the Air Force*, (5th Cir. 1989) 869 F.2d 852; *Coffman v. Glickman*, 328 F.3d 1619 (10th Cir. 2003); *Sher v. Department of Veterans Affairs* (1st Cir. 2007) 488 F.3d 489.

Bifurcation which limits trial *de novo* of the violations of the CSRA which were properly raised before the MSPB violates the spirit and the letter of the CSRA. It prevents the employee from presenting circumstantial and pretext evidence bearing on the issue to be decided – the motive of the employer. The DC Circuit recognized in *Hayes*, supra, 684 F.2d at 139-40 that if both discrimination issue and insufficient evidence to support agency decision, the mixed case is to be treated as a unit. The Ninth Circuit in *Tolliver*, *supra* at 1397. concluded that "[e]very circuit considering the issue of proper treatment of CSRA cases alleging a colorable racial discrimination claim has refused to approve bifurcation."

3. *Employees must Be Permitted to Present Evidence of CSRA Violations.*

The legislative history of the CSRA provides that "'[Q]uestions of the employee's inefficiency or misconduct, and discrimination by the employer, will be two sides of the same question and must be decided together.'" Id. at 1490 (quoting S.Rep. No. 95-969, 95th Cong., 2d Sess. 53, reprinted in 1978 U.S.Code Cong. & Ad. News 2723, 2775) (alteration in Williams). *Tolliver v. Dinero*, 790 F.2d at 1397. Granting summary judgment is inappropriate on issues relevant to determining the motive of the employer. *Crawford v. Potter* (8th Cir, 1994) 37 F.2d 1338, the Eight Circuit held:

> In reviewing the discrimination claim *de novo*, we keep in mind the caution that summary judgment should seldom be used in employment-discrimination cases. *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir.1991); *Hildebrand v. M-Tron Industries, Inc.*, 827 F.2d 363, 364 (8th Cir.1987), cert. denied, 488 U.S. 1004, 109 S.Ct. 782, 102 L.Ed.2d 774 (1989). Summary judgment is appropriate only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." *Johnson*, 931 F.2d at 1244. Because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant. *Id.*

The Ninth Circuit held "the district court did not err in granting judgement on the employees' claims based on the Civil Service Reform Act ("CSRA", 5 U.S.C. 7703. . . .The district court properly applied deferential review to the employees CSRA claims and granted summary judgment in favor of the Secretary. . ." (Pet. App. 8a) [4]

A central tenant of employment discrimination law was enunciated in *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *McDonnell Douglas* requires that plaintiffs must be given a fair opportunity to demonstrate that reasons advanced by the employer for the action taken are pretextual. Evidence that the employer maintains policies regarding procedures or other substantive matters that were not followed in terminating the employee is further evidence of pretext. *Village of Arlington Hts v. Metropolitan Housing Corp.*, 429 US 252, 267, 97 S. Ct. 555 (1977); *Hogan v. Pierce*, 31 FEP 115 (DDC 1983). Petitioners were stymied in their efforts to show that the reasons asserted for eliminating their positions were pretextual, since the district court bifurcated the CSRA violations and granted summary judgment based on review of the record.

In this case, there are hundreds of violations of the CSRA which were raised by Petitioners. For

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[4] The decision acknowledges that "the employees appeal the district court's entry of summary judgment on CSRA and Title VII discrimination claims and the district court's entry of judgment following a bench trial on ADEA and Title VII retaliation claims." (Pet. App. 3a) The statement that judgment on the CSRA claims was not appealed at Pet. App.8a is not correct.

example, 5 C.F.R. 351.501(a) requires "competing employees shall be classified on a retention register on the basis of their tenure of employment, veteran preference, length of service, and performance." The USGS violated this section of the RIF regulations by creating "unique competitive level codes", thus eliminating consideration of seniority, veteran preference, length of service and performance as factors in retention. This allowed USGS management to target older employees, because their bump and retreat rights were negated.

D. THE QUESTIONS PRESENTED INVOLVE IMPORTANT ISSUES OF FEDERAL LAW.

The questions presented in this case involves an important issue of federal law. Congress has long recognized the importance of eliminating age discrimination in federal employment. When Congress expanded the ADEA to the federal government in 1974, it emphasized that age discrimination can be as invidious as any other form of discrimination, and that it is especially harmful in the workplace:

> Discrimination based on age--what some people call 'age-ism' – can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and denies the

> Nation[] the contribution they could make if they were working."

H.R. Rep. No. 93-913 (1974), reprinted in 1974 U.S.S.C.A.N. 2811, 2849. Over the years, Congress has expanded the scope of § 633a. In 1978, for example, Congress eliminated the upper age limit for federal employees in order to end mandatory retirement in the federal sector. In so doing, Congress reiterated its strong policy that "as a matter of basic civil rights people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about race, sex, or age." S. Rep. No. 95493, at 3 (1977), reprinted in 1978 U.S.C.C.A.N 504, 506.

Congress has recognized the role that RIFs have played in age discrimination of federal employees. On March 9, 1972, Senator Bentsen introduced Senate Bill 3318 to subject the federal, state and local governments to the requirements of the ADEA, noting that as a result of recent government reductions in force ("RIF") orders issued by federal agencies, older employees were "transferred repeatedly, denied their right to 'bump' employees with less experience, or subject to veiled hints that their usefulness [was] at an end." 118 Conf. Rec. 7744-5 (1972) (statement of Sen. Bentsen), discussed in Fentonmiller, Keith R., "The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims", *American University Law Rev.*, June 1998, page. 7.

In the legislative history, Senators Jennings Randolph and Walter F. Mondale proclaimed that "if management in Government is allowed to take

arbitrary actions which, in effect, cause "cancelled careers," it may pose a serious threat to well-trained and conscientious employees and to the entire civil service system. See 119 Cong. Rec. 2648 (1973), citing a special study completed by the Senate Select Committee on Ageing, called "Cancelled Careers, the Impact of Reduction-in-Force Policies on Middle-Aged Federal Employees III" (Comm. Print 1972) by Elizabeth M. Heidbreder, National Council on the Aging's Institute of Industrial Gerontology, 92d Cong. Heidbreder found that agencies arbitrarily and artificially determined competitive areas and job assignments where senior employees could "bump" or "retreat" to during a RIF, resulting in an adverse impact on older federal workers. *Id.* at 1. ("while employees with considerable Federal service have job protection in that if their jobs are abolished they are supposed to be able to 'bump' other employees in similar jobs with less seniority or 'retreat' to a lesser graded position, there are always ways for overzealous supervisors to circumvent rules or harass subordinates.

Congress has enacted protection against age discrimination in order to ensure that federal employees are not forced out of their positions based on outmoded stereotypes against older employees. Review should be granted to resolve the conflict between the circuits and correct the errors of the Ninth Circuit regarding 1) placing the burden of proof on employee in ADEA disparate impact cases, in violation of the statute, the Congressional history, and recent Supreme Court precedent, *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505, 128 S. Ct. 2395 (June 19, 2008) after a finding that older workers were more likely to have been negatively affected by the RIF than younger

workers; 2) requiring direct evidence to proof disparate treatment by each employee and failing to shift the burden to the employer after a finding of "an officially sponsored culture of age-based discrimination" for two of the plaintiffs-cross-appellees as required by *Costa v. Desert Palace, Inc.*, 539 U.S. 90 (2003) and *Sprint/United Management Company v. Mendelsohn*, 128 S.Ct. 1140 (2008); and 3) Bifurcating non-discrimination issues in "mixed cases" where necessary to establish the discriminatory motive and pretext, assuming *arguendo*, that the direct evidence of age discrimination and the statistical evidence of disparate impact on older scientist are insufficient to support judgment for all twelve of the Petitioners.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, or alternatively, certiorari should be granted, the Ninth Circuit opinion should be vacated and the case remanded, in light of *Meacham v. Knolls Atomic Power Lab*, No. 06-1505, 128 S. Ct. 2395 (June 19, 2008).

Respectfully submitted,
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Nos. 04-17365, 04-17458, 05-16784, 05-16961
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID P. ADAM; LANFORD ADAMI; JAMES P. CALZIA; BELA CSEJTEY Jr.; ALICE S. DAVIS; JAMES L. DRINKWATER; ARTHUR B. FORD ARTHUR GRANTZ; BARRY F. HIRSHORN; H. MAHADEVA IYER, CHI-YU KING; STEPHEN L. LEWIS; ALLAN G. LINDH; DENNIS M. MANN; A. THOMAS OVENSHINE; BRENT D. TURRIN; CHESTER T. WRUCKE, Plaintiffs - Appellants,

v.

DIRK KEMPTHORNE, ** Secretary of the United States Department of the Interior, Defendant - Appellee.;

DAVID P. ADAM; LANFORD ADAMI; JAMES P. CALZIA; BELA CSEJTEY Jr.; ALICE S. DAVIS; JAMES L. DRINKWATER; ARTHUR B. FORD ARTHUR GRANTZ; BARRY F. HIRSHORN; H. MAHADEVA IYER, CHI-YU KING; STEPHEN L. LEWIS; ALLAN G. LINDH; DENNIS M. MANN; A. THOMAS OVENSHINE; BRENT D. TURRIN; CHESTER T. WRUCKE,
Plaintiffs - Appellees,

v.

DIRK KEMPTHORNE, Secretary of the United States Department of the Interior,
Defendant - Appellant.;

DAVID P. ADAM; LANFORD ADAMI; JAMES P. CALZIA; BELA CSEJTEY Jr.; ALICE S. DAVIS; JAMES L. DRINKWATER; ARTHUR B. FORD ARTHUR GRANTZ; BARRY F. HIRSHORN; H. MAHADEVA IYER, CHI-YU KING; STEPHEN L. LEWIS; ALLAN G. LINDH; DENNIS M. MANN; A. THOMAS OVENSHINE; BRENT D. TURRIN; CHESTER T. WRUCKE,
Plaintiffs - Appellants,

v.

DIRK KEMPTHORNE, Secretary of the United States Department of the Interior, Defendant - Appellee.

June 19, 2007, Argued and Submitted, San Francisco, California

September 9, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Northern District of California. D.C. No. CV-98-02094-CW. Claudia Wilken, District Judge, Presiding.

MEMORANDUM *

Before: REINHARDT, RYMER, and THOMAS, Circuit Judges.

This appeal arises from an employment discrimination lawsuit brought against the Secretary of the United States Department of the Interior ("the Secretary"), by 16 former employees of the Geologic Division of the United States Geological Survey (collectively "the employees"). The employees appeal the district court's entry of summary judgment on CSRA and Title VII discrimination claims and the district court's entry of judgment following a bench trial on ADEA and Title VII retaliation claims. The Secretary cross-appeals the district court's calculation of damages awarded to two employees for successful ADEA claims. We review the district court's findings of fact for clear error and legal conclusions de novo. Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 871 (9th Cir. 2001). We affirm in part and remand in part. Because the parties are familiar with the factual and procedural history of this case, we need not recount it here.

I

The district court did not err in granting judgment in favor of the Secretary on the employees' claims founded on the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633 et seq. The ADEA makes it "unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against [*3] any individual [who is at least 40 years of age] . . . because of such individual's age." 29 U.S.C. §§ 623(a), 631(a). The employees argue that the district court erred in entering judgment in favor of the Secretary on the employees' ADEA claims because the court (1) incorrectly applied the McDonnell Douglas analysis despite finding direct evidence that the reduction in force was motivated by age discrimination;

(2) failed to apply a mixed-motive analysis; and (3) improperly evaluated statistical evidence regarding disparate impact.

A

When a plaintiff puts forth circumstantial evidence of discrimination in an ADEA claim, courts employ the familiar burden-shifting framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000). The McDonnell Douglas analysis contains three steps. First, an employee must establish a prima facie case of discrimination by demonstrating that "they were (1) members of the protected class (at least age 40); (2) performing their jobs satisfactorily; (3) discharged; and (4) replaced by substantially younger employees with equal or inferior qualifications." Id. Second, if the employee establishes a prima facie case, the burden shifts to the employer to articulate "legitimate, nondiscriminatory reasons for the adverse employment action." Id. at 1282. Third, if the employer presents such a reason, "the presumption of unlawful discrimination simply drops out of the picture" and the employee has the burden to show that the articulated reason was pretext and the employer thus intentionally discriminated because of the plaintiff's age. Id. (internal quotation marks omitted).

The employees argue that the district court erred in applying the McDonnell Douglas analysis because they presented direct, rather than circumstantial, evidence of discrimination. When a plaintiff presents direct evidence in support of an ADEA claim, the McDonnell

Douglas analysis is unnecessary because the direct evidence allows the plaintiff to proceed directly to the question of whether the employer intentionally discriminated because of the plaintiff's age. Enlow v. Salem-Keizer Yellow Cab Co., 389 F.3d 802, 812 (9th Cir. 2004). See also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985). Although the district court did apply the McDonnell Douglas analysis, we nonetheless affirm because the mode of analysis made no difference to the ultimate question. n1 See Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003) (summary judgment may be affirmed on any ground supported by the record). As a practical matter, there is no effect when, as here, a court first determines that the plaintiff has established a prima facie case and that the defendant has articulated a nondiscriminatory reason before proceeding to the question of whether the defendant's actions were intentionally discriminatory. In either case, the district court's judgment ultimately rests on a determination of "the sole remaining issue [of] discrimination vel non." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (internal quotation marks omitted). Because the district court did reach the question of whether the employees proved intentional discrimination, any error resulting from application of McDonnell Douglas was harmless.

B

The employees next argue that the district court erred by not applying the mixed-motive analysis described by this Court in Costa v. Desert Palace, Inc., 299 F.3d 838, 853-54 (9th Cir. 2002), aff'd 539 U.S. 90, 123 S. Ct. 2148,

156 L. Ed. 2d 84 (2003). The mixed-motive analysis is only applicable, however, when "a protected characteristic was 'a motivating factor' in the employment action." Id. Here, the district court found that "there is no evidence that the relevant decision makers were acting in accordance with an age-based discriminatory animus." (emphasis added). Because the district court's finding in this regard was not clearly erroneous, we need not determine whether a mixed-motive analysis would have been proper had there been evidence that the relevant decision makers acted with any discriminatory animus.

C

The employees additionally argue that the district court made several errors in evaluating the statistical evidence presented regarding disparate impact. First, the employees argue that the district court failed to resolve the conflicting testimony of the parties' respective statistical experts. District courts are required to make factual findings. Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1090 (9th Cir. 2002). The findings must "be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." Id. (internal quotation marks omitted). The district court satisfied this requirement by rejecting the testimony of both statistical experts as inadequate.

Second, the employees argue that the district court committed clear error when it found that the employees' statistical evidence did not show a significant disparate impact on older employees. To

establish a prima facie case of a disparate impact violation of the ADEA, an employee must: "(1) show a significant disparate impact on a protected class or group; (2) identify the specific employment practices or selection criteria at issue; and (3) show a causal relationship between the challenged practices or criteria and the disparate impact." Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1190 (9th Cir. 2002). The district court held that the employees had not established a prima facie case of a disparate impact because they failed to isolate and identify the specific employment practice responsible for the disparate impact. We have held that a reduction in force may constitute a specific employment practice. Pottenger v. Potlatch Corp., 329 F.3d 740, 749 (9th Cir. 2003). However, analyzing the impact of a "generalized policy" is not specific enough. Smith City of Jackson, 544 U.S. 228, 241, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005). The district court found that the reduction in force could be broken down into different elements and that statistical analysis of the reduction in force as a whole was thus insufficient to meet the employees' burden. This factual finding is not clearly erroneous. n2

Third, the employees contend that the district court erred by failing to explain why it did not find that the statistical evidence demonstrated disparate treatment on the basis of age. The district court found that the employees' statistical analysis failed to provide any meaningful evidence because it did not take into account the type of work performed by each employee. Mindful that we have been skeptical of statistical analyses that "fail to account for other relevant variables," Pottenger, 329 F.3d at 748, we see no reversible error in the district court's conclusion.

D

In sum, the district court did not err in granting judgment in favor of the Secretary on the employees' ADEA claims.

II

The district court did not err in granting judgment on the employees' claims based on the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 7703. In an appeal from a decision of the Merit Systems Protection Board to a district court, the district court must review CSRA claims under the deferential standard described in 5 U.S.C. § 7703(c) and must review discrimination claims de novo. Washington v. Garrett, 10 F.3d 1421, 1428 (9th Cir. 1993). The employees argue that the district court improperly applied deferential review to their discrimination claims. We disagree. The district court properly applied deferential review to the employees' CSRA claims and granted summary judgment in favor of the Secretary on those claims-a judgment that the employees do not appeal. The district court declined, however, to grant summary judgment with respect to the employees' discrimination claims and proceeded to hold a full bench trial in which it considered those claims de novo. Indeed, in its summary judgment order, the district court stated:

> [T]he Court may properly consider Plaintiffs' claims of other wrongs based on the administrative record separately from Plaintiffs' discrimination claims, which the Court will review de novo. Thus, in this order, the Court will not consider any of Plaintiffs' discrimination

> claims ... and will rule only on Defendant's motion for summary judgment regarding whether the Division instituted the RIF and separated Plaintiffs in accordance with the CSRA.

Thus, the district court properly separated the CSRA claims from the discrimination claims and properly reviewed the discrimination claims de novo. There is no basis for reversing the district court's judgment on the CSRA claims.

III

The district court properly granted judgment on the claims of Drs. Iyer and King that the Secretary violated their rights under Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e et seq. The district court granted summary judgment on all of the Title VII except retaliation and granted judgment on the retaliation claims after a bench trial.

A

Title VII provides that "[i]t shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In claims alleging employment discrimination, the McDonnell Douglas burden-shifting analysis generally applies, unless the employee has put forth direct evidence. Lam v. University of Hawaii, 40 F.3d 1551, 1559 (9th Cir. 1994). Here the district court found that although Drs. Iyer and King established a prima facie case, they did not

put forth any additional evidence to suggest that the Secretary's nondiscriminatory explanation for their separation was pretext. The record supports the district court's conclusion.

B

Title VII also "prohibits an employer from retaliating against an applicant for employment because the applicant has opposed any unlawful employment practice." Lam, 40 F.3d at 1558. Retaliation claims are decided under the familiar McDonnell Douglas framework. Id. at 1559 n.11. To establish a prima facie case of discriminatory retaliation, a plaintiff must show: (1) that plaintiff engaged in activity protected by Title VII; (2) an adverse employment action; (3) a causal link between the protected activity and the adverse action. Miller v. Fairchild Industries, Inc., 797 F.2d 727, 731 (9th Cir. 1986). The district court found that although Drs. Iyer and King met the first two requirements, they failed to show a causal link between their protected activity and their termination. We review this factual finding under the highly deferential clear error standard. Miller v. Fairchild Indus. Inc., 885 F.2d 498, 503 (9th Cir. 1989). Applying this standard to the record, we see no clear error in the district court's findings.

IV

The Secretary cross-appeals the district court's calculation of damages awarded to plaintiffs Calzia and Wrucke. We review a district court's computation of damages for clear error. Lentini v. California Center for the Arts, Escondido, 370 F.3d 837, 843 (9th Cir. 2004).

A

The Secretary argues that the district court erred in calculating Calzia's damages by presuming that he would have been promoted to a higher pay grade had he not been laid off on account of his age. The district court based its calculation of Calzia's damages on expert testimony that Calzia would likely have been promoted from GS-12, Step 10, to GS-13, Step 4, in 2001 because his supervisors had recommended him for that promotion. Although the Secretary argues that promotions to a higher grade are not automatic and Calzia would not necessarily have been promoted, despite his supervisors' recommendation, the district court's decision to adopt the expert's calculations as the most reasonable measure of damages was not clearly erroneous.

However, in adopting the expert's calculations, the district court appears to have inserted a typographical error in the final figure, thereby increasing the award from $ 170,522, as calculated by the employees' expert, to $ 171,522. We thus remand for the sole purpose of allowing the district court to reconsider whether the judgment should be amended to correct the apparent clerical error.

B

The Secretary argues that the district court erred in calculating Wrucke's damages because the court failed to accurately determine the salary Wrucke would have earned had he chosen to be reassigned to. a lower pay grade. The district court found that Wrucke failed to mitigate his damages when he declined to "bump" into a

GS-13 position offered to him. Had Wrucke agreed to the bump to GS-13, he would have remained in his prior grade (GS-14, Step 10) for two years, after which he would have assumed "pay retention" status. Under "pay retention," Wrucke would have retained the pay of a GS-14 position, as long as it did not exceed 150% of the top step of his bumped position, and would have received 50% of the cost of living increases for the grade of his current position. The Secretary argues that this 50% limitation applies only to the "rate of basic pay," 5 C.F.R. § 536.205(c), defined as "exclusive of additional pay of any kind," 5 C.F.R. § 536.102, and that the locality pay increase would thus not have been reduced by 50%. However, the regulations cited by the Secretary are no longer current, and regulations effective May 1, 2005, indicate that locality pay is now treated as the rate of basic pay for purposes of pay retention; the 50% limitation now applies to increases in both regular pay and locality pay. See 5 C.F.R. § 531.610. Thus, the district court correctly calculated the amount Wrucke would have earned had he mitigated his damages.

V

We affirm the judgments of the district court, with the exception of the district court's calculation of Calzia's damages which is remanded for the sole purpose to allow the district court to enter a corrected judgment, if the district court finds it appropriate. Given our resolution of the issues on appeal, we need not-and do not-reach any other argument raised by the parties.

AFFIRMED; REMANDED.

Footnotes

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**Dirk Kempthorne is substituted for his predecessor, Gale A. Norton, as Secretary of the United States Department of the Interior, pursuant to Fed. R. App. P. 43(c)(2).

1 Because we affirm on the basis of harmless error, we need not determine whether the evidence cited by plaintiffs can properly be considered "direct evidence." See Enlow, 389 F.3d at 812 (defining direct evidence as "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude." (internal quotations omitted)).

2 In analyzing the disparate impact claim, the district court recited the "business necessity" test. The Supreme Court recently noted that "the business necessity test should have no place in ADEA disparate-impact cases." Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395 at 2404; 171 L. Ed. 2d 283 at 294, 2008 WL 2445207 at *8 (June 19, 2008). However, prior to considering the applicability of the "business necessity" test, the district court held that the employees failed to establish a prima facie case. Because we affirm on this ground, any error the district court made in applying the "business necessity" test to a disparate impact claim is harmless.

CONCUR BY: REINHARDT (In Part)

DISSENT BY: REINHARDT (In Part)

DISSENT

REINHARDT, Circuit Judge, concurring in part and dissenting in part.

At a speech delivered shortly before the round of firings that led to the present case, Dr. Gordon Eaton, the Director of the United States Geological Survey ("USGS"), asked his audience: "What is the difference between Jurassic Park and the Geological Division of the Geologic Survey?" The answer: "One is an amusement park filled with dinosaurs and the other is a movie." A poster announcing an employee meeting to discuss the workforce reduction contained the following cartoon caption: "You gotta help me, Mom . . . This assignment is due tomorrow, and Gramps doesn't understand the new tricks." These 'jokes' by no means reflect the isolated humor of individual USGS employees. Rather, a 1993 official report setting forth the agency's "Vision for the 21st Century" explained that "[s]ome segments of the USGS currently are suffering from an aging, high-grade workforce" and that this is "a critical problem that must be addressed ...."

On this record, I cannot agree with the majority's acquiescence in the district court's finding that "there is no evidence that the relevant decision makers were acting in accordance with age-based discriminatory animus." (emphasis added). I would hold that where there is irrefutable evidence of an officially sponsored culture of discrimination in a workplace, it is not

necessary to demonstrate that the individual who ultimately undertook the challenged adverse employment action was motivated to do so by his own discriminatory animus. See, e.g., Galdamez v. Potter, 415 F.3d 1015, 1026 n.9 (9th Cir. 2005)(explaining that discrimination occurs "where the ultimate decision-maker, lacking individual discriminatory intent, takes an adverse employment action in reliance on factors affected by another decision-maker's discriminatory animus"). Because the record in this case contains ample evidence of an officially sponsored culture of age-based discrimination at USGS, I would reach the merits of the employees' mixed-motive claim and find discrimination in violation of the ADEA. Accordingly, although I concur in the majority disposition in most respects, I respectfully dissent from Part I.B.

D.C. No. CV-98-02094-CW.

United States District Court
for the Northern District of California.

DAVID P. ADAM; et al, Plaintiffs,

v.

GALE NORTON, Secretary of the United States Department of the Interior, Defendant

Claudia Wilken, District Judge, Presiding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs David Adam, Lanford Adami, James Calzia, Bela Csejtey, Alice Davis, James Drinkwater, Arthur Ford, Arthur Grantz, Hariharaiyer Mahadeva Iyer, Chi-Yu King, Stephen Lewis, Allan Lindh, Alexander Thomas Ovenshine, and Chester Wrucke were employed by the United States Department of Interior, in the Geologic Division of the United States Geological Survey (USGS). In 1995, the Geologic division of the USGS conducted a reduction in force (RIF). As a result of the RIF, Plaintiffs Adam, Adami, Calzia, Csejtey, Davis, Drinkwater, Ford, Grantz, Iyer, King, Lewis, Ovenshine, and Wrucke were separated from the Survey and Plaintiff Lindh was demoted. Following proceedings before the Merit Systems Protection. Board and several motions for summary judgment in this Court, this case proceeded to trial on all of these Plaintiffs' claims that the adverse actions taken against

them were the result of discrimination based on their age and Plaintiff Iyer and King's claims that they were retaliated against. The Court now enters its findings of fact and conclusions of law with respect to these claims.

Findings of Fact

I. Structure of the Geologic Division

The Geologic Division of the USGS is responsible for conducting research in the earth sciences. Def. Ex. 7 at 5. At the time. of the RIF, the Geologic Division of the USGS was organized into five offices. Each office was managed by an office Chief and contained several branches, each managed by a Branch Chief. However, the work of the Geologic Division was funded through appropriations earmarked for ten different science programs. Filson TR 845. As relevant here, the office of Energy and Marine Ecology was responsible for implementing the work funded by the National Marine and Coastal Geology Program; the Office of Regional Geology was responsible for implementing the work funded by the National Cooperative Geologic Mapping Program; the Office of Earthquakes, Volcanoes, and Engineering was responsible for implementing the work funded by the Earthquake Hazards Reduction Program; the Office of Mineral Resources was responsible for implementing the work funded by the National' Mineral Resource Surveys Program; and all of the offices shared responsibility for implementing the work funded by the Global Change and Climate History Program.

II. The Transition Team

In 1993, following the change in presidential administration, from that of President George Bush to President William Clinton, the USGS prepared for the appointment of a new Director by creating a Transition Team composed of employees of all Divisions of the USGS that was charged with preparing a report discussing the future of the USGS. McCarthy TR 1443-45. That report, entitled "A Vision for the 21st Century," discussed the USGS's need to reorient itself from simply "surveying the Nation's lands and assessing the quantity of mineral, energy, and water resources" to conducting "integrated analyses of the Earth's environment, hazards, and resources to assure sustained global health, welfare, and prosperity." P1. Ex. 7 at 2. In a section entitled "Recruitment," the Transition Team described the existence of an "aging workforce" as a "critical problem" faced by the USGS. More specifically, the Transition Team report stated:

> Recruitment follows from staffing requirements that are consistent with the Bureau staffing plan. Well planned and effective recruitment results in identification of the best and brightest candidates for placement in positions, whether recruited from within or outside the current workforce. Proper recruiting ensures the merging of new and vital talents required to maintain a healthy distribution of age, grade, and skills. Potential sources of high quality candidates should be identified before the need exists. Such proactive recruiting is critical when opportunities for hiring are minimal.
>
> This discussion presupposes that a plan will be developed to allow for the hiring of new, young workers. Some segments of the USGS currently

> are suffering from an aging, high-grade workforce that has limited the organization's financial flexibility and restricted the influx of new ideas and talents. An aging workforce is a critical problem that must be addressed earnestly and creatively before any strategic recruitment plan can be implemented.

P1. Ex. 7 at 10

The Transition Team report thus expresses the USGS's legitimate concern that too many of its employees were highly experienced scientists and too few of its employees were less experienced scientists and technical support staff. However, the Transition Team report goes beyond this legitimate concern to explicitly express concern with the age of the USGS's workers. P1. Ex. 7 at 10 ("[s]ome segments of the USGS currently are suffering from an aging, high-grade workforce";" [a]n aging workforce is a critical problem"). Nor can the Transition Team report's references to age be considered to be merely a proxy for experience, because the Transition Team report discusses age and experience as separate characteristics. Pl. Ex. 7 at 10 ("a healthy distribution of age, grade, and skills"; "an aging, highgrade workforce"). Thus, the Transition Team report strongly suggests that many USGS managers and employees were aware that the USGS, and particularly the Geologic Division, had an aging workforce and believed that this had negative implications for the future of the USGS. Further, the Transition Team report was relied upon by USGS management in planning change. Eaton TR 809.

III. Appointment of Dr. Gordon Eaton

Dr. Gordon Eaton was appointed Director of the USGS in March, 1994. Eaton TR 785. He was sixty-five years old at the time. Eaton TR 802. He was selected for this position by the then Secretary of the Department of the Interior, Bruce Babbitt. Eaton TR 788-91. Dr. Eaton reported that, during the interview process, Secretary Babbitt explained that he was looking for a Director who was willing and able to affect change within the USGS to make it more responsive to national needs and social concerns. Eaton TR 790. According to Dr. Eaton, Secretary Babbitt also expressed his concern that there had been "inadequate development of leadership among the young people to move forward into positions of responsibility." Eaton TR 514.

IV. Dr. Eaton's Speeches

After his appointment in March, 1994, Dr. Eaton immediately went to the three major centers of the Geologic Division -- Menlo Park, Denver, and Reston -- to "address the troops." Eaton TR 791. He spoke on a number of topics, including the need for change. Eaton TR 792. In his speech in Menlo Park, on March 23, 1994, Dr. Eaton used a poster that was handed to hire by Bill Normark, the Geologic Division's principal representative in Menlo Park. The poster depicted a bewildered-looking dinosaur captioned, "Which is scarier, change or extinction?" Pl. Ex. 4 at 13. Dr. Eaton also described the dinosaur poster in his speech in Denver on March 15, 1994. Pl. Ex. 7 at 3. In his speech in Reston on March 28, 1994, Dr. Eaton repeated a riddle he said he heard from members of the Transition Team. The riddle asked, "What is the difference between Jurassic Park and the Geological Division of

the Geologic Survey?" The answer was, "one is an amusement park filled with dinosaurs and the other is a movie." Pl. Ex. 6 at 40.

Dr. Eaton testified that he used the poster because it reflected what he wanted to say about the need for change within the organization: "that failure-to change would ultimately lead to nonexistence." Eaton TR 793-94. Dr. Eaton similarly testified that he told the riddle because the Transition Team had found that there was resistance to even the idea of change. Eaton TR 795-96. Dr. Eaton testified that he did not intend to ridicule older scientists, Eaton TR 796, and that he used the dinosaur image to refer to "people of any age who were unresponsive to change," Eaton TR 819. Dr. Easton's s testimony that his use of dinosaur imagery to describe those he considered resistant to change was not related to his perception regarding the age group of such people is belied by the text of his speeches. Dr. Eaton led up to the dinosaur joke by describing the Transition Team as composed of people of the „generation" behind him and by stating that most of the people that they had found who were resistant to the idea of change were of Dr. Eaton's "generation." P1. Ex. 6 at 39-40. After telling the joke, Dr. Eaton concluded, "So those of you in my generation in the Geology Division, take that." P1. Ex. 6 at 40. Further, in his speech in Denver, Dr. Eaton lamented the lack of diversity in age in the Geologic Division, particularly the lack of "bright new young active minds." Pl. Ex. 7 at 45. Dr. Eaton explicitly tied this concern to the rules governing RIFs, which he described as having the undesirable effect of depriving of their jobs those most recently hired, including women, minorities, and the young. Pl. Ex. 7 at 45-46. Therefore, the Court fends that Dr. Eaton

associated resistance to change in the Geologic Division with older workers and the ability for change with the ability to hire new, younger workers.

V. Program Plans

On February 1, 1995, Dr. John Filson, who served as Acting Chief Geologist of the Geologic Division from November 1, 1994 until March 31, 1995, Filson TR 840, sent a memo to the Geologic Division Office Chiefs instructing them to form Program Councils and to have the Program Councils develop program plans that identified the program's goals for the next five fiscal years, Filson TR 842-44; Def. Ex. 1005. Dr. Filson sent this memo because he believed that the lack of long--term planning was a weakness of the Geologic Division, and that the Geologic Division needed a greater understanding, of its long-term goals. Filson TR 843-44.

The program plan of the National. Marine and Coastal Geology Program defined the purpose of the Program as "to describe marine and coastal. geologic systems, to understand the fundamental processes that create, modify and maintain them, and to develop predictive models that provide understanding of natural systems, the effects of [people's] activities on them, and a capability to predict future change. Def. Ex. 1010 at AR 15628. The program plan identified four categories of research: (1) Environmental Quality and Preservation, or research that addresses the geologic issues. which influence the long-term quality and preservation of marine environments; (2) Natural Hazards and Public safety, or research conducted to better understand the frequency and distribution of catastrophic events, including coastal and nearshore erosion and offshore

earthquakes and landslides, and the geologic processes affecting such events; (3) Natural Resources, or research aimed at providing an understanding of the distribution of geologic resources, including energy, marine mineral, and water resources, in the marine and coastal realms and of the processes that control the composition, origin, and availability of such resources; and (4) Information and Technology, or activities that provide reconnaissance sea-floor mapping as well as information management and dissemination services. Def. Ex. 1010 at AR 1562425. The program plan reflected a recent shift in emphasis toward a greater focus on environmental and hazards studies and away from resource studies, as well as a greater emphasis on investigations in shallower water, the upper one kilometer of the sea floor, and regions offshore of major metropolitan areas. Def. Ex. 1010 at AR 15636.

The program plan of the National Cooperative Geologic Mapping Program identified the objective of the program as ensuring that the "nation will continue to have the geological maps it needs to protect the health of our citizens and promote economic growth." Def. Ex. 1012 at AR 15581. The program plan called for the Mapping Program to focus its efforts on approximately fifteen different priority mapping projects, chosen because they would help support the goals of one or more other Geologic Division programs. Def. Ex. 1012 at AR 15592. The program plan also called for the creation of a National Geochronology Support Team and a National Paleontology Support Team to provide geochronologic and paleontologic support to the mapping projects. Def. Ex. 1012 at 15592. This represented a change from the past practice of the Mapping Program, which had been to fund

approximately 150 projects each staffed with only one or two scientists. Def. Ex. 1012 at AR 15592.

The program plan of the Earthquake Hazards Reduction Program defined the objective of the program as "provid[ing] a firm understanding of the likelihood and potential effects of moderate- to-large earthquakes in densely-populated regions" in order to assist in efforts to mitigate the effects on the social and economic well-being of the country. Def. Ex. 1014 at AR 15506. More specifically, the goals of the program were to "understand what happens at the earthquake source by determining how faults break and radiate seismic energy," "evaluate where future earthquakes are likely to occur, how big they could be, how often they may recur, and when the next earthquake may strike a particular region," "predict what the effects of an earthquake in a specific region will be in terms of faulting, ground motion, landslides, sea waves (tsunamis), building losses, and other physical changes," and "stimulate the use of research results, including transferral of specific information to engineering practitioners, land-use planners, State and local officials, emergency preparedness agencies, industry and the general public in formats that can be understood by the nonscientist." Def. Ex. 1014 at AR 15506. The program plan reflected an increased emphasis on conducting hazard assessments, particularly in urban environments, creating hazard maps that delineated regions of relative seismic risk, and conducting real-time analysis of earthquake data. Weaver TR 1154; Mooney TR 1405. The program plan de-emphasized short-term earthquake prediction, the study of volcano-related seismic activity, and the

collection of data regarding strong ground motion. Weaver TR 1154; Mooney TR 1405.

The program plan of the National Mineral Resource Surveys Program defined the program's objective as providing "current, accurate, unbiased information on the location, quality, and quantity of mineral resources, and on the environmental consequences of their development" in order to allow federal and State agencies, industry, and the general public to "make informed decisions concerning land stewardship, mitigation, and mineral Supply." Def. at AR 15818. The program plan identified four subprograms: (1) Assessments, involving research to "provide information on known mineral deposits, predict the probable location and quantity of undiscovered mineral deposits, and anticipate the kinds of environmental effects that could result from minerals development"; (2) Mitigation Studies, involving research to "provide information to assist governmental efforts to identify hazards-on inactive or abandoned mine lands on public lands, to determine their impact on humans and the environment, and to formulate solutions to investigations, involving research to discover new mineral deposits, especially research into "new mineral-deposit concepts" and "new regions of mineral-resource potential"; and (4) Information and Technology Transfer, involving developing and distributing mineral resources databases and improving capabilities to interpret data through scientific visualization techniques. Def. Ex. 1007 at AR 15815--19. Under the program plan, although Assessments remained the core focus of the program, a decreasing percentage of effort would be devoted to them. Def. Ex. 1007 at AR 15815. The percentage of effort devoted to Resource

Investigations would decrease significantly, while the percentage of effort devoted to Information and Technology transfer would increase slightly and that devoted to Mitigation Studies would increase significantly. Def. Ex. 1007 at AR 15815.

The program plan of the Global Change and Climate History Program defined the objective of the program as contributing to the effort to identify and predict changes in the Earth's climate that are related to human activities. Def. Ex. 1011 at AR 15606. The program plan identified three areas of research, (l) Climate History, or "characterizing and understanding past and present natural variability of Earth's climate and environment," (2) Carbon Cycle, or "understanding past and current processes at the Earth's surface that affect or are affected by climate change, with emphasis on the carbon cycle," and (3) Regional Effects of Change, or "determining the current and potential effects of climatic and environmental changes on regions and systems that are especially sensitive t o change." Def. Ex. 1011 at AR 15606, 15611. The program plan called for Climate History research to continue to be the focus of the program, but to receive a declining percentage of effort, while Carbon Cycle and Regional Effects research would receive an increasing percentage of effort. Def. Ex. 1011 at AR 15611; Poore TR 243-44.

VI. Financial Constraints Affecting the Geologic Division

At the same time that the USGS as a whole was facing the challenge of changing its mission to be more responsive to current national needs, the Geologic

Division was facing the additional challenge of limited financial resources. Russ TR 973. As explained by Dr. David Russ, who was then the Associate Chief Geologist and responsible for overseeing the financial activities of the division, Russ TR 973, during the years proceeding the RIF, increases in funding for the science programs had not kept pace with increases in salary commitments, leading to declining availability of funds for operating expenses, or funds to purchase the equipment and supplies necessary to conduct the research that was the Geologic Division's mission, Russ TR 986-87; Filson TR 846-48. By fiscal year (FY) 1995, the percentage of science program funds available to pay operating expenses had fallen significantly below the twenty to twenty-five percent necessary for viable scientific programs, Russ TR 988.

More specifically, in the National Marine and Coastal Geology Program, appropriations increased from thirty million dollars in FY 1991 to thirty-five million dollars in FY 1995. During that same period, salary costs increased from fifteen million dollars to twenty-one million dollars, while available operating funds decreased from 2.7 million dollars to 1.7 million dollars. Russ TR 982-83. During that same period in the National cooperative Geologic Mapping Program, overall appropriations increased from nineteen million dollars to twenty-two million dollars, but salaries increased from eleven million dollars to fifteen million dollars. This resulted in a decrease of available operating funds from two million dollars to six hundred seventy-two thousand dollars. Russ TR 982. In the Earthquake Hazards Reduction Program, overall, appropriations increased from thirty-five million dollars in FY 1991 to just over forty-nine million for FY 1995,

largely as a result of special funds appropriated in response to the Loma Prieta Earthquake. However, during that same period, salaries increased from 15,5 million dollars to twenty seven million dollars, and available operating funds decreased from 3.3 million dollars to less than five hundred thousand dollars. Russ TR 976-77. In the National Mineral Resource Surveys Program, overall. appropriations dropped from 46.4 million dollars in FY 1991 to 44.8 million dollars in FY 1995, and salary costs for the same period increased from 29 million dollars to 34 million dollars. Operating funds available for research in this program decreased from four million dollars to zero. Russ TR 983. In the Global Change and Climate History Program, the overall appropriations were about 9.7 million dollars in FY 1991, shifted modestly, but were again about 9.7 million in FY 1995. During that same period, however, salaries increased from 5.4 million dollars to more than 6.8 million dollars. Russ TR 982.

VII. Decision to Conduct RIF

As early as 1994, then Chief Geologist Ben Morgan expressed his belief that the Geologic Division needed to conduct a RIF to reduce the Division's salary commitments. Eaton TR 809, 785; Def. Ex. 1002. However, before deciding to implement a RIF, the Geologic Division took other steps to attempt to reduce salary costs. Russ TR 987. The Geologic Division reduced its hiring, did not renew certain non-permanent appointments, and offered financial incentives for employees to end their employment. Russ TR 987; Filson TR 849,. However, these measures did not reduce the Geologic Division's salary commitments enough to allow the Geologic Division to

spend enough of its budget on operating expenses. Russ TR 98891. Also, in early 1995, the Geologic Division was told by the House Appropriations Committee that it should expect to experience a significant reduction in its budget. Russ TR 989-90; Filson TR 857. Therefore, in early spring 1995, Dr. Eaton made the decision to go forward with the RIF. Eaton TR 827, 831.

VIII. Announcement of Decision to Conduct RIF

In accordance with Dr. Eaton's decision to go forward with the RIF, on March 9, 1995, then Acting Chief Geologist Filson issued a "General Notice of Workforce Reduction" to "inform all Geologic Division employees that significant workforce reductions must be expected." Def . Ex. 1022. The Notice explained that the RIF was necessary because the funding for division programs had "remained practically constant since 1991'1 limiting the availability of operating funds necessary to "carry out program commitments." Def. Ex. 1022.

Filson conducted several briefings in Menlo Park, California on March 23 and March 24, 1995 in order to answer questions about the RIF. Prior to the scheduled briefings, Cynthia Ramseyer, secretary to. the Assistant Chief Geologist for the Western Region, created and distributed a flyer notifying staff of the time, place, location, and topic of the meeting. Ramseyer TR 892; P1. Ex. 9. Consistent with her practice of including a Gary Larson cartoon on such documents to catch peoples attention, Ramseyer included a Gary Larson cartoon on this flyer. Ramseyer TR 892-93. The cartoon showed a dog saying to his mother, "You gotta help me, Mom . . , This assignment

is due tomorrow, and Gramps doesn't understand the new tricks." Pl. Ex. 9. While Ramseyer testified that she chose this particular cartoon because the RIF meant that "everybody was having to learn something nobody knew anything about" and that it was not her intention to make fun of. older employees, Ramseyer TR 893, the Court is skeptical of this explanation given the cartoon's clear reference to older people.

However, there is no evidence that Ramseyer played any role in the RIF itself. Ramseyer TR 593.

IX. Regulations Governing the RIF

Because the USGS is a federal government agency, the Geologic Division's RIF was governed by federal regulations. 5 C.F.R. Part 351. The regulations then applicable required the Geologic Division to establish "competitive levels" consisting of all positions which are „in the same grade (or occupation level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that any agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption." 5 C.F.R. § 351.403(a) (1) (1995, as modified by 60 F.R. 3055); Palmer TR 503. "Undue interruption" is defined as "a degree of interruption that would prevent the completion of required work by the employee 90 days after the employee has been placed in a different position." 5 C.F.R. 35.203 (1995, as modified by C.F.R. 3055); Collins TR 959. "Competitive level determinations are based on each employee's official position, not the employee's personal qualifications." 5

C.F.R. § 351.403 (a) (2) (1995, as modified by C.F.R. 3055); Collins TR 924.

The then-applicable regulations required the Geologic Division to establish a retention register for each competitive level. 5 C.F.R. § 351.404 (a) The retention register lists the employees within the competitive level, ranked by retention factors. Palmer TR 503. The first retention factor is tenure group. Career employees are classified higher than career conditional employees who are classified higher than temporary and term employees. Palmer TR 503-04. The second factor is veteran status, in which veterans within each tenure group are classified higher than non-veterans within the same tenure group. Palmer TR 504. The third factor is the adjusted service computation date (ASCD), that is, years of service adjusted for the three most recent performance appraisals. The, earlier the ASCD, the higher ranked the employee. Palmer TR 504. If a position within a competitive level is abolished, employees with the lowest retention standing are released first. 5 C.F.R. § 351.601 (1995) ("Each agency shall select competing employees for release from a competitive level under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register.)

Employees who are released from their competitive level. in a RIF may have an assignment right to displace another employee through a bump or retreat. Palmer TR 504-05; see 5 C.F..R. 351.701 (1995, as modified by 60 F. R. 3055) . With a bump, an employee in a higher ranked tenure group or subgroup can displace someone in a lower tenure group or subgroup,

if that employee is qualified to perform the job within a normal training period. For example, a career veteran can displace a career non-veteran if the former is qualified. Palmer TR 504; Collins TR 928-929. With a retreat, an employee with an earlier ASCD can displace an employee in the same tenure group and subgroup who holds a job that the retreating employee previously held. Palmer TR 505; Collins TR 932-933.

x. Revision of Employees' Position Descriptions and Personnel Records

In preparing for a RIF, an agency should allow employees an opportunity to review and update their personnel folders to ensure that the retention factors are correct. Collins TR 922-23. In addition, position descriptions should be updated and accurate because they will be used to determine competitive levels and assignment rights. Collins TR 922-23. In accordance with this, on March 9, 1995, Dr. Filson advised that employees should "begin now to update their personnel records to reflect all pertinent experience (paid and unpaid) not already documented in their official personnel folder." Def. Ex. 1422; Filson TR 850. On the same date, he also sent a memo to Division managers directing them to review and update the position descriptions to ensure that the position descriptions reflected the current duties of the employees under their supervision. Def. Ex. 1021; Filson TR 851.

XI. Revision of Competitive Levels Used in the RIF

In order to conduct a RIF, the Geologic Division needed to ensure that its positions were assigned to appropriate competitive levels. To address this issue,

sometime prior to March, 1995, Dr. Filson asked John McGurk, the Division Personnel. officer, to prepare a paper on how competitive levels in the earth sciences should be established for the purposes of 'a RIF. Filson TR 853-54. McGurk concluded that the existing competitive level. codes were probably not workable or effective in a RIF, and that new competitive levels should be developed based on position descriptions. Filson TR 854-55; Def. Ex. 0123. McGurk recommended that each research position in the Division be placed in a separate competitive level. Filson TR 854-55. Dr. Filson rejected McGurk's recommendation because it did not seem credible that no scientist in the Division was qualified to perform the work of any other scientist. Filson TR 855. He instead recommended that competitive levels be determined based on management review and scientific certification. Filson TR 855-56; Def. Ex. 1023.

Based on Dr. Filson's recommendation, the Division established peer panels of subject matter experts (SMEs) to review the competitive levels assigned to research scientist and technical positions.fn1 Tilling TR 1178. The peer panel reviewing competitive levels for the Western Region of the Geologic Division was comprised of seven research scientists, each with a different area of expertise. Tilling TR 1178-81. Using descriptors abstracted from position descriptions, or full position descriptions if it felt that the descriptors were not informative enough, the peer panel compared positions to determine if they were unique or interchangeable. Tilling TR 1181-83. In determining whether two positions were interchangeable, the peer panel considered whether a person could move into the other job, and vice versa, without undue interruption

(i.e., without losing any speed on the project work in ninety days). Tilling TR 1182. The SMEs did not consider or discuss the ages of the incumbents of the positions. Tilling TR 1183. After the peer. panel's deliberations, only a few positions were placed in common competitive levels. Tilling TR 1189-90. This result was not surprising because research scientists, especially in the higher grades, define their own jobs and become experts in a given field or geologic province or technique, causing each research scientist to have a unique position description. Tilling TR 1190.

XII. Creation of Unpopulated Staffing Plans

During the spring of 1995, the Program Councils were instructed to develop staffing plans for their respective programs. Field TR 1052-53 (National Marine and Coastal Geology Program); Sutter TR 1095 (National Cooperative Geologic Mapping Program); Weaver TR 1151 (Earthquake Hazards Reduction Program) ; Worl AR 35452 (National Mineral Resource Surveys Program); Poore TR 244 (Global Change and Climate History Program). The Program Councils developed the staffing plans by using the program priorities as defined in the program plans to determine what positions were needed to conduct the prioritized projects. Field TR 1053-54 (National Marine and Coastal Geology Program); Sutter TR 1096--97 (National Cooperative Geologic Mapping. Program); Weaver TR 155-56 (Earthquake Hazards Reduction. Program) ; Worl AR 35452-55 (National Mineral Resource Surveys Program) ; Poore TR 244 (Global Change and Climate History Program). The Program Councils were instructed to develop staffing plans that met certain fiscal constraints, with most of the Program

Councils developing multiple versions of the staffing plans at differing funding levels. Field TR 1053 (National Marine and Coastal Geology Program) ; Sutter TR 1098 (National Cooperative Geologic Mapping Program); Weaver TR 1156 (Earthquake Hazards Reduction Program) ; Worl AR 35452 (National Mineral Resource Surveys Program) ; Poore TR 244-45 (Global Change and Climate History Program) . The staffing plans were unpopulated, in that they listed positions, not individuals. Field TR 1452-53 (National Marine and Coastal Geology Program); Sutter TR 1097 (National Cooperative Geologic Mapping Program); Weaver TR 1155 (Earthquake Hazards Reduction Program) ; Worl AR 35452-55 (National Mineral Resource Surveys Program) ; Poore TR 244-45 (Global Change and Climate History Program) .

XIII . Review and Revision of Staffing Plans

In the late spring of 1995, then Chief Geologist Dr. P. Patrick Leahy appointed a committee to review the program plans and the staffing plans to ensure that the staffing plans were consistent with the program plans and that the staffing plans met the needs of the Geologic Division as a whole. Leahy TR 165-67. The committee was led by Tom Fouch, the Acting Regional Assistant Chief Geologist, and included approximately twenty members, the majority of whom were scientists. Leahy TR 165-66. The Fouch Committee reviewed the staffing plans and made recommendations, Def. Ex. 1016, which were presented to the Office Chiefs for evaluation and accommodation. Leahy TR 167-68. One of the concerns expressed by the Fouch Committee was that the Geologic Division had been too "program

centric" in developing the staffing plans. Leahy TR 170. As a result, Dr. Leahy, the Office Chiefs, and a few others met at the Summerfield Suites hotel in May, 1995 to review the list of the positions that were slated to be' abolished to see if those positions could be supported by multiple programs and thus retained. Leahy TR 169-71. At this meeting, some positions were placed back on the staffing plans, in order to ensure that the staffing plans incorporated positions with needed capabilities. Leahy TR 170-72.

XIV. Creation of Populated Staffing Plans

Geologic Division managers then populated the staffing plans by comparing the positions listed on the unpopulated staffing plans with the position descriptions of the Geologic Division's employees. Field TR 1455-56 (National Marine and Coastal. Geology Program) ; Butter TR 1099 (National Cooperative Geologic Mapping Program); Weaver TR 1155-56 (Earthquake Hazards Reduction Program); Worl AR 354S6-57 (National Mineral. Resource Surveys Program) ; Poore TR 245-46 (Global Change and Climate History Program). There is no evidence that these managers discussed employees' ages in populating the staffing plans. Field TR 1056-57 (National. Marine and Coastal Geology Program); Sutter TR 1100 (National. Cooperative Geologic Mapping Program); Weaver TR 1157 (Earthquake Hazards Reduction Program) ; Poore TR 246 (Global Change and Climate History Program).

XV. Scope of Assignment Rights

After the staffing plans were populated and the employees whose positions were not placed on the staffing plans were released from their competitive levels, the Geologic Division was required to evaluate the assignment rights of those employees before releasing them from employment. Before doing so, the Geologic Division had to make certain decisions regarding the scope of those assignment rights. Those decisions were articulated in a memo issued by Dr. Leahy on June 19, 1995 entitled "Ground Rules for Reduction-in-Force." Def. Ex. 1033; Leahy TR 178-79. In making those decisions, Dr. Leahy attempted to balance -the goals of giving employees the maximum benefits possible under the applicable regulations and avoiding disruption of the Division's programs. Leahy TR 179-80.

Among the choices Dr. Leahy made was to disallow intra-tenure group bumping. As he explained:

In general bumping rights permit employees to displace employees only in a lower tenure group or subgroup. At their discretion, agencies can establish ground rules that permit employees to bump to other positions within their own tenure subgroup if they are qualified for the position and have greater length of service than the incumbent. The Geologic Division will not extend assignment rights beyond those required by law and regulation.

Def. Ex. 1033 at AR 17376. Dr. Leahy made this choice for two reasons. First, because most employees in the Division are in the same tenure group as career, non-veteran employees, allowing intra-tenure group bumping would create hundreds of displacements and

downgrades, causing a major disruption in the Division's ability to meet its programmatic responsibilities. Second, if bumping rights were expanded, grade and salary retention benefits would force the Division to abolish more positions in order to achieve the desired savings. Def. Ex. 1033 at AR 17378; Leahy TR 181-83. Dr. Leahy was aware that expanding bumping rights would advantage the Division's "highly experienced senior scientists" at the expense of "younger, more recently trained staff." Def. Ex. 1033 at AR 17378. However, there is no evidence that Dr. Leahy made this decision in order to disadvantage older employees. Leahy TR 181. As Charles Collins, defendant's expert on federal RIFs, explained, allowing intra-tenure group bumping, or "administrative assignment rights,", is an expensive proposition. Collins TR 934. Allowing administrative assignment rights results in multiple displacements where otherwise there would be just one, increasing disruption to the agency. Collins TR 934-38. Further, allowing administrative assignment- rights also hinders an agency's ability to reduce salary costs, because increased bumping rights translates to more employees with grade retention and salary retention rights. Collins TR 940-41.

XVI. Evaluation of Assignment Rights

The assignment rights of employees were evaluated by an SME panel. The SMEs were GS-14 and GS-15 scientists, chosen for their broad -range of expertise and because they were highly respected, had -quite a bit of integrity," and would not be easily swayed by the Branch Chiefs. McCarthy TR 1453. The SMEs who evaluated the Plaintiffs' assignment rights included

Robert Christiansen, sixty years old at the time of the RIF; Carl Wentworth, fifty-nine years old; William Ellsworth, forty-eight years old; Charles Bacon, forty-eight years old; Randolph Koski, forty-nine years old; and Floyd Gray, forty-three years old.. Christiansen TR 1233; Wentworth TR 1254; Ellsworth TR 1265, 1287; Bacon TR 1290; Koski TR 1380, 1385-86; Gray TR 1203-04.

To assist the SMEs in identifying potential bumps or retreats the RIF Coordinators developed a system of "pods." McCarthy' TR 1454. A pod is a grouping of positions that fall within a range of geologic or geophysical expertise. McCarthy TR 1453-54; Def. Ex. 1035. With assistance from two classification specialists from the Personnel Office, Dr. Jill McCarthy, RIF Coordinator for the Western Region, assigned to pods all research positions and specialized technical positions in Menlo Park. Administrative, non- specialized technical, and non-specialized technician positions were not assigned pods. McCarthy TR 1455-56. The pod assignments were then reviewed by the Branch Chiefs or their representatives, who made recommendations for changes, some of which were adopted. McCarthy TR 1456-57.

To evaluate potential retreats, the SMEs compared the released employee's former position descriptions with current position descriptions to determine whether the jobs were essentially identical. If a released employee's former position description was missing or vague, they looked at his or her Professional Technical Record (PTR) or work Plans. Wentworth TR 1255-1256; Ellsworth TR 1268; Bacon TR 1292-1293. To evaluate bumps, they looked at the released employee's PTR to

determine whether the employee was qualified to perform a job without undue interruption. Wentworth TR 1254, 1256; Ellsworth TR 1266, 1268-1269; Bacon TR 1293. The SMEs consulted with the Branch Chiefs when they needed clarification about the requirements of a particular position. Field TR 1072; Mooney TR 1420-1421. The Branch Chiefs did not, however, have the power to veto a hump or retreat. Wentworth TR 1257. There is no evidence that any of the SMEs considered or discussed the age of employees when they evaluated assignment rights. Cray TR 1245; Christiansen TR 1234; Wentworth TR 1254-55; Ellsworth TR 1267; Bacon TR 1291-1292; Koski TR 1389.

XVII. Add Back of Positions

The Program Councils had been instructed to assume when developing staffing plans that there would be a significant reduction in funding, on the order of ten to twenty percent lower than the previous fiscal year. Leahy TR 173. This assumption was based on guidance that the USGS had received from the House Appropriations Committee. Russ TR 989-90. However, in the summer of 1995, it began to appear that the USGS's budget would actually be cut by only two or three percent. Leahy TR 174. While the Geologic Division proceeded with the RIF because this improvement in the budget outlook was not sufficient to address the problem of insufficient operating expenses, Leahy TR 174-75, this smaller than anticipated reduction allowed the Division to add some positions back onto the staffing plans in July, 1995. Leahy TR 175. To determine which positions should be added back to the staffing plan, Dr. Leahy asked each

of the office Chiefs to submit a prioritized list of proposed add-backs. Leahy TR 175. The Division Policy Council then made the final decisions. Leahy TR 175. in deciding whether to add a position back, the Division Policy council considered whether there was a long term need for the position; whether the position encompassed critical skills; whether the position would serve the needs of an emerging area; whether the position would have adequate support staff; and whether the workforce was flexible enough to face future budget issues. Leahy TR 176-77. There is no evidence that age was considered or discussed by the Division Policy Council. Leahy TR 177.

XVIII. Effect of the RIF on older Workers

Older workers were more likely to have been negatively affected by the RIF than younger workers. Pl. Ex. 313 at 21; Def. Ex. 1235 at 13. However, without more,, this does not suggest that age played a causal role in determining which employees were affected by the RIF, because it does not account for other factors that may have influenced which employees were affected by the RIF. Palmer TR 592; Def. Ex. 1236 at 5-7; Def. Ex. 1235 at 9. Such factors include the employee's grade and performance history, Lepowsky TR 461-63, as well as the type of work performed by the employee, Palmer TR 509, 530; Def. Ex. 1236 at 6; Def. Ex. 1235 at 9. Plaintiffs presented evidence that, even after the employees' grade and performance are taken into account, older workers are more likely to have been negatively affected. by the RIF than younger workers. Lepowsky TR 465, 467-68. However, Plaintiffs presented no evidence that took into account the effect on RIF outcomes of the type of work an

employee performed. Lepowsky TR 487-88. It is not reasonable to believe that the Geologic Division was indifferent to the type of work being performed in deciding which positions to retain following the RIF. Palmer 509, 534; Def. Ex. 1236 at 6; Def. Ex. 1235 at 9. Therefore, an analysis of the RIF that fails to take such information into account does not provide any meaningful evidence from which. it could be inferred that age played a causal role in determining which employees were affected by the RIF.fn2

XIX. RIF Experience of the Individual Plaintiffs

A. National Marine and Coastal Geology Program

1.Alice Davis

Plaintiff Alice Davis was fifty-three years old at the time of the RIF. Def. Ex. 1238. Davis was employed as a GS-13, Geologist in the Branch of Pacific Marine Geology in the Office of Energy and Marine Geology. Pl. Ex. 469. Her research focused on the geologic framework, particularly volcanic processes, that surrounded the formation of minerals on the ocean floor. Davis TR 897. Such areas of research, including framework geology, tectonic and deep sea mineral studies, and deep sea studies were de-emphasized in the National. Marine and Coastal Geology Program plan. Field TR 1050. Further, Davis admits that Dr. Field was favoring sedimentological and coastal work in creating the staffing plant Davis TR 911, 916, as opposed to the volcanic and deep sea work that was her area of focus, Davis TR 897. As a result of these factors, Davis's position was not included on the staffing plan. There is no evidence that Davis's position was not

included on the staffing plan because of her age.fn3 Field TR 1456.

Davis's assignment rights were evaluated by SMEs Floyd Gray and Charles Bacon. There is no evidence that Davis's age was considered in determining her assignment rights. Gray TR 1208; Bacon TR 1294. Indeed, Davis testified that she knows both Gray and Dr. Bacon, that she thinks they did the best they could, and that she does not think either would have considered her age. Davis TR 913. However, Davis does claim that the SMEs lacked the information needed to make such evaluations, because Geologic Division managers arranged to have position descriptions modified in order to prevent particular employees from being RIFed. Davis's supervisor, Randolph Koski, instructed her to remove work that she had done previously from her position description, because the description should be limited to present job duties. Davis TR 943; Koski TR 1380-81. However, Koski instructed a different employee, Jane Reid, to include in her position description job duties that she was not presently performing, but that he intended her to perform in the future. Koski TR 1382-83. The inclusion of these additional job duties that Reid had not yet begun to perform prevented Davis from being able to retreat into Reid's position. Koski TR 1384-85; Davis TR 941. However, there is no evidence that Koski gave this advice to protect Reid from being RIF'd because she was younger than Davis; rather, the evidence suggests that Koski sought to ensure that the project's future needs would be met and to minimize potential disruption to his project.

2. Stephen Lewis

Plaintiff Stephen Lewis was forty-five years old at the time of the RIF. Def. Ex. 1238. Dr. Lewis was employed as a GS-14 Geophysicist in the branch of Branch Marine Geology in the office of Energy and Marine Geology. P1. Ex. 561. Dr. Lewis's research focused on "the crustal structure geophysics, structural geology, stratigraphy, regional tectonics, and earthquake hazards of the continental margins of the western United states, Alaska, and the western and southern Pacific ocean." P1. Ex. 561 at AR 29521. This type of research was included in the National Marine and Coastal Geology Program's program plan. Def. Ex. 1010 at AR 15657-61. However, as Dr. Field explained, Dr. Lewis's position-was not included on the staffing plan because there were not enough positions on the staffing plan to house all the employees in the program. Field TR 1056. There is no evidence that Dr. Lewis's age was a factor in this decision. Field TR 1056. Indeed, at the MSPB hearing, Dr. Lewis claimed that his position was abolished because he made a whistleblowing complaint, and because he had disagreements with Dr. Field over a proposal to move the branch to Santa Cruz, California from Menlo Park, California and over the use of large ships. in the branch. Lewis TR 697-698. Further, there is no evidence that Dr. Lewis's age was considered when his assignment rights were evaluated. Wentworth TR 1259.

B. National Cooperative Geologic Mapping Program

1. Lanford Adami

Plaintiff Lanford Adami was sixty years old at the time of the RIF. Def. Ex. 1238. Adami was employed as a

GS-12 Chemist assigned to the Branch of Isotope Geology in the office of Regional Geology. Pl. Ex. 419. Adami's position was in a unique competitive level even before the USGS established new competitive levels. Adami TR 649. His duties involved supporting the research of other scientists by managing a stable isotope lab. Adami TR 648, 639-40. In 1994, the lab that he managed was consolidated with a lab supported by the Water Resources Division due to lack of funds. Adami TR 648. Adami's position was not included on the National Cooperative Geologic Mapping Program's staffing plan because it was not a high priority. Sutter TR 1100-01. In fact, after Adami was RIF'd, the lab ceased to function. Adami TR 648. There is no evidence that Adami's age was a factor in this decision. Sutter TR 1100.

Adami's assignment rights were evaluated by SMEs Floyd Cray and Robert Christiansen. There is no evidence that they considered Adami's age when assessing his assignment rights. Gray TR 1207; Christiansen TR 1237. However, Adami asserts that he should have been allowed to bump into a GS-9 physical science technician position held by Jame Saburomaru Adami TR 543. The SME panel never considered whether Adami was entitled to bump into this position because it was added back onto the staffing plan after Adami's assignment rights were evaluated. Christiansen TR 1239-40. Regardless of whether this procedure complied with the applicable RIF regulations, there is no evidence that the SMEs' failure to consider Adami for this position was because of his age.

C. Earthquake Hazards Reduction Program

1. Allan Lindh

Plaintiff Allan Lindh was. fifty-two years old at the time of the RIF. Def. Ex. 1238. Dr. Lindh was employed as a GS-15 Geophysicist in the Branch of Seismology in the Office of Earthquakes, Volcanoes, and Engineering. Pl. Ex. 568. His research focused on the statistical prediction of earthquakes within the San Andreas fault system. Pl. Ex. 568 at AR 30652. Because earthquake prediction was an area that the Earthquake Hazards Reduction Program was de-emphasizing, this position was not needed to meet the program's goals. Weaver TR 1160-61. Dr. Lindh acknowledged as much in a draft letter that he wrote to be sent to the journal Science, in which he lamented the Geologic Division's retreat from any serious commitment to earthquake prediction research. Lindh TR 273-75. Consistent with the Earthquake Hazards Reduction Program's decision to de-emphasize earthquake prediction, Dr. Mooney recommended that the Program Council not include Dr. Lindh's position on the staffing plan. Mooney TR 1409-10. There is no evidence that Dr. Mooney's recommendation was based on Dr. Lindh's age. Mooney TR 1411. Dr. Mooney's recommendation was initially followed, but then the Branch Chief of Western Regional, Geology, Jack Hillhouse, recommended that Dr. Lindh be restored to the staffing plan because it did not seem fair not to place a former Branch Chief on the staffing plan. Mooney TR 1411. Concerned that this staffing decision was based on emotional rather than programmatic reasons, Dr. Mooney called Craig Weaver, the Acting Chair of the Program Council, Weaver TR 1148, and requested that the decision be reversed. Mooney TR 1411-12. Dr. Mooney . explained to Dr. Weaver that placing Dr. Lindh on the staffing

plan meant losing an electrical engineer, Frederick Fisher. Mooney TR 1412. Because the program needed the skills of an electrical engineer, Dr. Mooney asked Dr. Weaver to place Fisher on the staffing plan instead of Dr. Lindh. Mooney TR 1412. There is no evidence that Dr. Mooney's request to substitute Fisher for Dr. Lindh was based on Dr. Lindh's age. Mooney TR 1412.

A panel of SMEs that included William Ellsworth evaluated Dr. Lindh's assignment rights. Ellsworth TR 1269. The SMEs found that Dr. Lindh was eligible to hump to a GS-12 position. Ellsworth TR 1275. Dr. Mooney concurred with their decision. Ellsworth TR 1276. There is no evidence that there was any discussion or consideration of Dr. Lindh's age in determining his assignment rights. Ellsworth TR 1269. Dr. Lindh served as a GS-12 Operational Geophysicist for the remainder of his career with the USGS. Lindh TR 144.

2. H. Mahadeva Iyer

Plaintiff H. Mahadeva Iyer was sixty-four years old at the time of the RIF. Def. Ex. 1288. Dr. Iyer was employed as a GS-15 Geophysicist in the Branch of seismology in the office of Earthquakes, Volcanoes, and Engineering. P1. Ex. 532. His expertise was in seismic studies of geothermal and volcanic systems. Mooney TR 1415. Dr. Iyer's position was not placed on the Earthquake Hazards Reduction Program's staffing plan because his research was not focused on earthquake-related hazards. Mooney TR 1415-16. In fact, prior to the RIF, Dr. Iyer did not have funding for his research. Mooney TR 1416-17. Instead, he was performing administrative duties, and his salary was paid from

Branch Assessments which were in limited supply. Mooney TR 141819. As a result of these factors, and possibly as a result of personal conflicts with his Branch Chief Dr. Mooney, Dr. Iyer's position was not included on the staffing plan. Mooney TR 1415-19; Iyer TR 96. There is no evidence that Dr. Iyer's position was not included on the staffing plan because of his age, Mooney TR 1416, nor is there any evidence that his age was considered during the bump and retreat evaluation process, Ellsworth TR 1269-70.

In November, 1994, Dr. Iyer was among a group of four scientists (including Plaintiff Chi -Yu King) who complained to the office. Chief about the Geologic Division's failure to fund the research projects of minority scientists. Iyer TR 88-89. As a result of their complaint, a meeting, was held and recommendations were drafted and placed in a memo. Dr. Mooney joined in that memo. Iyer TR 89, 98. While Dr. Mooney was aware of the scientists' complaint regarding the Geologic Division's failure to fund the research projects of minority scientists, there is no evidence that he considered this complaint when he made staffing recommendations. Mooney TR 1417. While SME Ellsworth was not aware of the memo at the time he evaluated Dr. Iyer's assignment rights, as a former Branch Chief, Dr. Ellsworth was aware that Dr. Iyer was vocal in his support of minority or under-represented groups. Ellsworth TR 1270. However, there is no evidence that Dr. Ellsworth considered those activities in evaluating Dr. Iyer's assignment rights. Ellsworth TR 1271.

3. Chi -Yu King

Plaintiff Chi, -Yu King was sixty-one years old at the time of the RIF. Def. Ex. 1235. Dr. King was employed as a GS-14 Geophysicist in the Branch of Earthquake, Geology and Geophysics in the Office of Earthquakes, Volcanoes, and Engineering. P1. Ex. 551. Dr. King's expertise was in geochemical, hydrological, and mechanical approaches to earthquake prediction. King TR 128. At the time of the RIF, his research focused on monitoring radon gas emanations along active faults with the goal of catching a premonitory signal. of an imminent earthquake. Mooney TR 1414. While Dr. King's approach was highly valued in Japan, the former U. S . S . R . , .and Europe, it was not highly valued by the Geologic Division, as indicated by the fact that Dr. King had had difficulty obtaining funding for his research. King TR 128-29. Dr. King's position was not included on the Earthquake Hazards Reduction Program's staffing plan because the program was de-emphasizing earthquake prediction. Mooney TR 1415; Weaver TR 1162. The two other geophysicists who were involved in some aspect of geochemical or hydrological earthquake prediction were also RIFed. King TR 129-30. There is no evidence that Dr. King's age was a factor in the decision not to include his position on the staffing plan. Mooney TR 1415; Weaver TR 1162. Nor is there any evidence that Dr. King's age was considered when he was evaluated for potential bumps eats. Wentworth TR 1258-59.

D. National Mineral Resource Surveys Program

1. James Calzia

Plaintiff James Calzia was forty-eight years old at the time of the RIF Def. Ex. 1238. Dr. Calzia was employed

as a GS-12 Geologist in the Branch of Western Mineral Resources in the Office of Mineral Resources. Pl. Ex. 430. At the time of the RIF, he was the project chief of two projects, one conducting a mineral assessment in the son Bernardino National Forest and the other conducting a mineral assessment in the Barstow area. Calzia TR 1356; P1. Ex. 430 at AR 20166. Defendant argues that Dr. Calzia was terminated because -both of these projects were scheduled to end in FY 1995, a fact that Dr. Calzia admitted, Calzia, TR 1373. However, Ronald Worl, Branch Chief of the Branch of Western Mineral Resources and Dr. Calzia's supervisor, admitted that decisions regarding which positions to place on the staffing plan were made on the basis of the skills reflected in the position descriptions, not on the basis of the projects on which a particular person was working. MSPB Testimony of Ron Worl at AR 1335. As Dr. Worl explained, it made sense to focus on skills rather than projects, because that enabled the office of Mineral Resources to retain people with the skills necessary to do the work regardless of which short-term project they were assigned to MSPB Testimony of Ron Worl at AR 1335. Further, it is clear from Dr. Calzia's position description that the skills involved in conducting mineral assessments in the San Bernardino National Forest and the Barstow area were applicable to conducting such assessments in other geographic areas. P1. Ex. 430. Thus, Defendant's explanation for the decision to terminate Dr. Calzia is not persuasive.

There is also credible evidence that Dr. Worl attempted to protect younger workers from being negatively impacted by the RIF. Dr. Worl admitted that he called a meeting of the younger members of the Branch of Western Mineral Resources to give them advice about how to avoid the upcoming RIF. MSPB Testimony of

Ron Worl at AR 1301. While Dr. Worl contends that he gave such advice to all members of the Branch, he does not dispute that he was particularly concerned with trying to make sure that the younger members of the Branch received and followed this advice. MSPB Testimony of Ron Worl at AR 1300-01. Thus, considering the evidence that Defendant's stated legitimate non-discriminatory mason for RIFing Dr. Calzia is not credible, that Dr. Worl displayed age-based discriminatory animus, and that the Geologic Division at the time of the RIF was tainted by age-based discriminatory animus, the Court finds that it is more probable than not that Dr. Calzia's age was a substantial factor in his termination.

2. Chester Wrucke

Plaintiff Chester Wrucke was sixty-seven years old at the time of the RIF. Def. Ex. 1238. Dr. Wrucke was employed as a GS-14 Geologist in the Branch of Western Mineral Resources in the Office of Mineral Resources. Wrucke TR 592. His area of expertise was determining mineral resource potential. Wrucke TR 591. At the time of the RIF, he was working on a number of different projects, including the Tenabo quadrangle study, the Barstow area mineral. resource assessment, the Denali National Park Mapping Project, a quadrangle study in Arizona, and the San Bernardino National Forest mineral resource assessment. Wrucke TR 595-96. Defendant argues that Dr. Wrucke was 'terminated because these projects were not on the National Mineral Resource Surveys program plan. However, as discussed above, Ronald Worl, Branch Chief of the Branch of Western Mineral Resources and Dr. Wrucke's supervisor, admitted that decisions

regarding which positions to place on the staffing plan were made on the basis of the skills reflected in the position descriptions, not on the basis of the projects on which a particular person was working. MSPB Testimony of Ron Worl at AR 1335. Thus, Defendant's explanation for the decision to terminate Dr. Wrucke is not persuasive. Further, as discussed above; there is credible evidence that Dr. Worl attempted to protect younger workers from being negatively impacted by the RIF. Thus, considering the evidence that Defendant's stated legitimate nondiscriminatory reason for RIFing Dr. Wrucke is not credible, that Dr. -Worl displayed age-based discriminatory animus, and that the Geologic Division at the time of the RIF was tainted by age-based discriminatory animus, the Court finds that it is more probable than not that Dr. Wrucke's age was a substantial factor in his termination.

3. Bela Csejtey

Plaintiff Bela Csejtey was sixty-one years old at the time of the RIF. Def. Ex. 1238. Dr. Csejtey was employed as a GS-14 Geologist in the Branch of Alaskan Geology in the Office of Mineral Resources. Pl. Ex. 461. At the time of the RIF, he was project chief of the Denali National Park Mapping Project, the primary objective of which was to produce a geologic map of the McKinley Quadrangle. Csejtey TR 285-86. Defendant asserts that Dr. Csejtey was RIFed because this project was not on the program plan. Consistent with this contention, David Carter, Branch Chief of the Branch of Alaskan Geology and Dr. Csejtey's supervisor, testified that he was informed that he could not place Dr. Csejtey on the staffing plan of the

National Mineral Resource Surveys program because Dr. Csejtey's research did not fall within the mandate of that program. MSPB Testimony of David Carter at AR 13925; see also Csejtey TR 288. However, as Dr. Carter was appalled to discover, the National Mineral Resource Surveys Program funded this project the very next year. MSPB Testimony of David Carter at AR 13927. Further, the project was staffed by younger employees. Ford TR 626-27. This could suggest that the Geologic Division's decision not to fund this project in FY 1995 was a pretext for discrimination. However, in the absence of any additional information, it is not possible to determine that it is more probable than not that age, as opposed to a change in plans or even bureaucratic error, was the reason for this decision. Further, there is no evidence that the SME panel considered Dr. Csejtey's age in determining that he was not entitled to bump or retreat into any other positions. Wentworth. TR 1257.

4. Arthur Ford

Plaintiff Arthur Ford was sixty-three years old at the time of the RIF,. Def. Ex. 1238. Dr. Ford was employed as a GS-15 Geologist in the Branch of Alaskan Geology in the office of Mineral Resources. P1. Ex. 487. At the time of the RIF, Dr. Ford was. working on Denali National Park Mapping Project and a mineral assessment project in southeastern Alaska. Ford TR 625; MSPB Testimony of David Carter at AR 13928-29. As discussed above, Dr. Carter could not place the Denali National Park Mapping Project on the staffing plan because this research did not fit within the mandate of the National Mineral Resource Surveys Program. MSPB Testimony of David Carter at AR

13925, While the mineral assessment project in southeastern Alaska did fit within the mandate of the National Mineral Resource Surveys Program, the Program Council had decided to de-emphasize work in southeastern Alaska because the research vessel that had supported the work had been sold several years previously and most of the research that could be conducted based on the previously collected data had been completed. MSPB Testimony of David Carter at AR 13928-29. In addition, Dr. Ford-was a member of the Branch of Alaskan Geology who was based in Menlo Park at a time when the Branch favored staff in Anchorage. Csejtey TR 342; MSPB Testimony of David Carter at AR 13924. For all these reasons, Dr. Ford's position was not included in the National Mineral Resource Surveys program staffing plan. There is no evidence that his age was considered by the SMEs who evaluated his assignment rights. Wentworth TR 1257.

5. James Drinkwater

James Drinkwater was forty-four years old at the time of the RIF. Def. Ex. 1238. Drinkwater was employed as a GS-11 Geologist in the Branch of Alaskan Geology in the Office of Mineral Resources. Pl. Ex. 479. His research involved framework geologic studies related to mineral resources, appraisals, or land use, primarily in southeastern Alaska. Drinkwater TR 730-31. Because, as discussed above, the National Mineral Resource Surveys program was de-emphasizing work in southeastern Alaska, MSPB Testimony of David Carter at AR 13928-29, Drinkwater's position was not included on the staffing plan. There is no evidence that his age was considered by the SMEs who evaluated his assignment rights. Gray TR 1209; Bacon TR 1294.

A. Thomas Ovenshine

Plaintiff A. Thomas Ovenshine was fifty-nine years old at the time of the RIF. Def. Ex. 1238. Dr. Ovenshine was employed as a GS-15 Geologist in the Branch of Resource Analysis in the Office of Mineral Resources. Pl. Ex. 517. His position involved serving "as an advisor on mineral policy issues relating to the Mineral Resource Surveys Program (MRSP) and as a representative of the MRSP to international organizations." P1. Ex. 6171 Ovenshine TR 57. Dr. Ovenshine s position was not abolished in the RIF. Ovenshine TR 57. Rather, he was displaced through a bump by David Piper, an older employee who had a veteran's preference. Ovenshine TR 58. There is no evidence that the SME panel that found Dr. Piper qualified to bump into Dr. Ovenshine's position considered either Dr. Piper's age or Dr. Ovenshine's age, Gray TR 1208, nor is there any evidence that the SME panel that evaluated Dr. Ovenshine's assignment rights considered his age, Bacon TR 1295.

7. Arthur Grantz

Plaintiff Arthur Grantz was sixty-seven years old at the time of the RIF. Def. Ex. 1238. Dr. Grantz was employed as a GS-16 Geologist in the Branch of Alaskan Geology in the Office of Mineral. Resources. P1. Ex. 496. Before the RIF, he was working on a climate history of the Arctic Ocean. P1. Ex. 496. Although he was in the Branch of Alaskan Geology, Dr. Grant's research was principally funded by the Global Change and Climate History Program and the National Marine and Coastal Geology Program. P1. Ex. 496. Dr. Grant's super-visor in the Branch of Alaskan Geology, David

Carter, was not able to fit Dr. Grantz's position into the program plan of the National Mineral Resource Surveys Program. MSPB Testimony of David Carter at AR 13924. Dr. Carter believed that Dr. Grant's research was important to the Geologic Division, and that his position should have continued t o be funded by the Global Change and Climate History Program and/or the National Marine and Coastal Geology Program. MSPB Testimony of David Carter at AR 13925. However, Dr. Field explained that the National Marine and Coastal Geology Program did not consider placing Dr. Grantz on that program's staffing plan because Dr. Grantz was not housed administratively in the Branch of Pacific Marine Geology and thus the branch did not have his position description. Field TR 1056-57. There is no evidence that Dr. Grant's position was not funded by the National Marine and Coastal Geology Program because of his age,. Field TR 1057. Rather, it appears that Dr. Grantz was RIFed because of a failure of coordination and cooperation on the part of the different programs and branches of which he was a part. Further, there is no evidence that Dr. Grant's age was considered when his assignment rights were evaluated. Bacon TR 1294-95.

E. Global Change and Climate History Program.

1. David Adam

Plaintiff David Adam was fifty-four years old at the time of the RIF. Def. Ex. 1238. Dr. Adam was employed as a GS-14 Geologist in the Branch of Paleontology and Stratigraphy. P1. Ex. 389. His position was funded by the Global Change and Climate History Program. Adam TR 35. Dr. Adam worked as "a

geologist and palynologist conducting basic research in paleontology and stratigraphy specializing in the climate history of the upper Cenozoic." P1. Ex. 389 at AR 18246. At the, time of the RIF, his research was concentrated in the Klamath Basin. Adam TR 35. To support his research and that of others in the Geologic Division, he had designed a state-of-the-art pollen extraction laboratory with a refrigerated core storage unit that was set to be completed in the fall of 1995. Adam TR 35-36. The Global Change and Climate' History Program's" program plan included conducting research to develop climate records in Western North America, as Dr. Adam did. Poore TR 253. However, the Global Change and Climate History Program's staffing plan did not have enough positions for all of the people conducting such research, particularly because the program plan de-emphasized climate history. Poore TR 253, 244. Further, the Program Council decided to use the long-term core storage facility in Denver, rather than the one in Menlo Park, because the one in Denver had a permanent staff, facilities for -core preparation and photography, a database, and areas for visiting scientists, and because the Program council was not convinced that any potential scientific benefits of refrigerating cores were worth the added expense. Poore TR 252, 248. Considering these factors, the Program Council decided not to include a palynology. position in Menlo Park on the staffing plan.

There is no evidence that Dr. Adam's age was a factor in this decision. Poore TR 246. Further, there is no evidence that Dr. Adam's age was a factor in the SME panel's conclusion that he was not entitled to bump or retreat into any other positions. Christiansen TR 1233, 1237.

CONCLUSIONS of LAW

l. Age Discrimination

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., makes it "unlawful for an employer . . . to discharge any individual [who is at least forty years of age] , because of such individual's age." 29 U.S.C. § 623(a), 631 (a). This prohibition against age discrimination protects employees of federal agencies. 29 U.S.C. § 633a(a) (providing that personnel actions affecting such employees "shall be made free of any discrimination based on age"). "When challenging an adverse employment action under the ADEA, an employee may proceed under two theories of liability: disparate treatment or disparate impact." Coleman v. Quaker Oats Co., 232, F. 3d 1271, 1291 (9th Cir. 2000)

A. Disparate Treatment

A. disparate treatment claim challenges an employer's treatment of "some people less favorably than others because of their race, color, religion, or other protected characteristics." Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

To establish a violation of the AREA under the disparate. treatment theory of liability, an employee must first establish a prima facie case of age discrimination. Coleman, 232 F.3d at 128081. To do so, an employee must show that: (1) at the time of an adverse employment action, he or she was forty years of age or older; (2) some adverse employment action was taken against him or her; (3) at the time of the adverse employment action, he or she was satisfactorily

performing his or her job; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination, such as by showing that "the employer had a continuing need for [his or her] skills and services in that [his or her] various duties were still being performed." Id. at 1281 (internal quotation marks omitted).

If, an employee. establishes such a prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment decision. Id. Once an employer articulates such a reason, the employee must demonstrate that the articulated reason is a pretext for discrimination "either directly by persuading the court that a discriminatory reason more likely than not motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). The employee's evidence must be "both specific and substantial to overcome the legitimate reasons" articulated, by the employer. Aragon v. Republic Silver State Disposal,- Inc., 292 F.3d 654, 659 (9th Cir. 2002) (emphasis in original). The ultimate burden of proof remains always on the employee to show that the employer. intentionally discriminated against him or her because of his or her age. Coleman, 232 F.3d at 1281.

Here, Plaintiffs contend that they were subjected to an adverse employment action during the RIF because of their age. Each Plaintiff has established a prima facie case of age discrimination: (1) each Plaintiff was forty years of age or older at the time of the RIF; (2) each Plaintiff was separated or demoted from his or her

position during the RIF; (3) each Plaintiff was satisfactorily performing his or her job at the time of the RIF; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination, namely within the context of an agency culture in which both management and employees had expressed age-based discriminatory animus. Defendant has articulated. a legitimate, non-discriminatory reason for its decision to terminate or demote each Plaintiff, namely its decision to conduct a RIF in order to address the Geologic Division's budgetary problems. See Coleman, 232 F.3d at 1282 ("A RIF is a legitimate nondiscriminatory reason for laying off an employee."). Plaintiffs argue that the RIF was a mere pretext for discrimination, in that the Geologic-Division did not need to conduct a RIF, and that even if a RIF was necessary, Plaintiffs were targeted in the RIF because -of their age. Further, Plaintiffs claim that the Transition Team report, Dr. Eaton's speeches, and the "old dog" cartoon on the RIF meeting notice all demonstrate that age-based discrimination motivated Plaintiffs' termination or demotion.

Plaintiffs have introduced evidence that the Geologic Division's culture, at the time of the RIF, was tainted with age-based discriminatory animus. This animus was evident in the Transition Team report, Dr. Eaton's speeches, and the "old dog" cartoon on the RIF meeting notice. Further, this animus was fairly widespread, as evidenced by the Transition Team report, which relied upon input received from approximately a third of the USGS's workforce. However, evidence of a culture of age-based discriminatory animus is not sufficient to establish that any particular Plaintiff was adversely impacted during the RIF because of his or her age. Dr.

Eaton, the committee that wrote the Transition Team report, and the creator of the "old dog" cartoon RIF meeting notice did not play any role in deciding whether any of the Plaintiffs would be separated during the RIF or whether any of the Plaintiffs was entitled to bump or retreat into a different position. The separation decisions were made primarily by the relevant Branch Chiefs, and the bump and retreat decisions were made by a panel of SMEs.

In the case of all of the Plaintiffs except Calzia and Wrucke, there is no evidence that the relevant decision. makers were acting in accordance with an age-based discriminatory animus. Further, the evidence demonstrates that Defendant had legitimate, non-discriminatory, programmatic reasons for separating or demoting 411 of the Plaintiffs other than Calzia and Wrucke. Therefore, the court finds in favor of Defendant on the disparate treatment claims of Plaintiffs Adam, Adami, Csejtey, Davis, Drinkwater, Ford, Grantz, Iyer, King, Lewis, Lindh, and Ovenshine.

However, with respect to Plaintiffs Calzia and Wrucke, there is evidence that the actions of the relevant decision maker, Ron Worl, were tainted with age-based discriminatory animus, in that Worl. acted to protect younger workers from the RIF. Further, Defendant's explanation for the decisions to terminate Plaintiffs Calzia and Wrucke are not worthy of credence. Based on this evidence, viewed in combination with the evidence of the existence of a culture of age-based discriminatory animus in the Geologic Division, the Court finds in favor of Plaintiffs Calzia and Wrucke on their disparate treatment claims.

B. Disparate Impact

"A disparate impact claim challenges 'employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'" Pottenger v. Potlach Corp., 329 F.3d 740, 749 (9th Cir. 2003) (quoting Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977))." [T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

To establish a violation of the ADEA. under the disparate impact theory of liability, an employee must first establish a prima facie case of discrimination by "(1) show[ing] a significant disparate impact on a protected class or group; (2) identify[ing] the specific employment practices or selection criteria at issue; and (3) show[ing] a causal relationship between the challenged practices or criteria and the disparate impact." Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1190 (9th Cir. 2002).

If an employee establishes such a prima facie case, the burden then shifts to the employer who may either demonstrate that no statistical disparity exists or may "produce evidence that its disparate employment practices are based on legitimate business reasons, such as job-relatedness or business necessity." Rose v. Wells Fargo & Co., 902 F. 2d 1417, 1424 (9th Cir. 1990). Once the employer does so, then the employee must show

that another employment practice would serve the employer's legitimate interests without having a similar undesirable discriminatory effect. Id. To prevail on their disparate impact claim, Plaintiffs must "isolate [e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities," Wards Cove Packing Co Inc. v. Atonio, 490 U.S. 642, 656 (1989) (quoting Watson, 487 U.S. at 994). Here, Plaintiffs identify the RIF as a whole as the specific employment practice that had a disparate impact on older workers. The Ninth Circuit has held that a RIF may be such a specific employment practice. Pottenger; 329 F.3d at 749. However, the Supreme Court has made clear that an employee cannot "make out a case of disparate impact simply by showing that, 'at the bottom line,' there is . . . imbalance in the work force." Wards Cove, 490 U.S. at 657. Rather, the employee must "demonstrate that it is the application of a specific or particular, employment practice that has created the disparate impact under attack." Id.; see also 42 U.S.C. 2000e-2 (k) (1) (B) (i) (requiring that the plaintiff demonstrate that "a particular employment practice causes a disparate impact" unless the plaintiff "can demonstrate to the court that the elements of [the defendant's] decisonmaking process are not capable of separation for analysis") : Under the circumstances presented here, Plaintiffs cannot meet their obligation to isolate and identify the specific employment practice responsible for the disparate impact by pointing to the RIF as a whole, because Defendant's decisionmaking process during the RIF can be separated into different elements. In fact, Plaintiffs did so in their opposition to Defendant's motion for summary judgment, identifying the use of more narrow competitive level codes and the refusal to expand assignment rights as specific

employment practices that had a disparate impact on older workers.

Further, even if Plaintiffs were entitled to proceed on their theory that the RIF as a whole had a disparate impact, Plaintiffs would still not prevail. If it is the RIF as a whole that is alleged to have had a disparate impact, then Defendant can rebut Plaintiffs' disparate impact claim by demonstrating a legitimate business reason for conducting the RIF. Defendant has done so here, by proffering evidence establishing that the Geologic Division needed to conduct a RIF in order to reduce its salary obligations. Plaintiffs have not identified any other course of action that Defendant could have taken that would have reduced the Geologic Division's salary obligations enough to generate the operating funds that it needed to meet its programmatic goals. Therefore, the Court finds in favor of Defendant on Plaintiffs' disparate impact claims.

II. Retaliation

The ADEA also makes-it "unlawful for an employer to discriminate" an employee because the employee has opposed any practice made unlawful by [the ADFA] " or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA]." 29 U.S.C. § 623(d).

"To make out a claim of retaliation [under this section], an employee must establish three things: first, that' he [or she] engaged in statutorily protected activity; second, that he [or she] was discharged or suffered some other adverse employment decision; and third,

that there is a causal connection between the two." O'Day v. McDonnell Douglas Helicopter Co., 79 F. 3d 755, 763 (9th Cir. 1996).

Plaintiffs Iyer and King engaged in statutorily protected conduct by signing a memo complaining about the Geologic Division's failure to fund the research projects of minority scientists.

Further, Plaintiffs Iyer and King suffered an adverse employment action, in that they were separated from their positions during the RIF. However, there is no evidence suggesting a causal connection between their protected activity and their termination. Therefore, the Court finds in favor of Defendant on Plaintiffs Iyer and King's retaliation claims.

Footnotes

fn1Peer panels have traditionally been used in the Geologic Division to evaluate a number of decisions, including project funding and promotions. Tilling TR 1180.

fn2 Defendant introduced evidence suggesting that once the type of work being performed is taken into, account, by considering the pods to which the employees were assigned, age did not have a statistically significant effect on the probability that an employee was negatively impacted by the RIF. Def. Ex. 1235 at 14-15. However, the statistical technique used' by Defendant's expert in reaching this result gives undue weight to the RIF experience of non-scientists and disproportionately excludes from the analysis the RIF experience of scientists. P1. Ex. 313 at

21-32. For this reason, the court does not rely upon the opinion of Defendant's expert to find that age did not play a role in the RIF; the Court merely finds that Plaintiffs did not prove that it did.

Fn3Dennis Mann testified that, at Branch meetings prior to the RIF, Dr. Field stated that the RIF' was going to give him opportunities to create vacancies that in the future he could fill with young Ph.D.s. Mann TR 715. Dr. Field denied making such a statement. Field TR 1060. Mann's testimony is not credible. Mann did not make this claim in a declaration previously submitted to the Court. Mann TR 726. Plaintiffs' attorney never questioned Dr. Field about such a statement. Field TR 1060. Moreover, although Mann believes that Davis attended these meetings, Mann TR 726, she did not recall Dr. Field making such a statement, Davis TR 912

Filed 11/19/08
Nos. 04-17365, 04-17458, 05-16784, 05-16961
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID P. ADAM; LANFORD ADAMI; JAMES P. CALZIA; BELA CSEJTEY Jr.; ALICE S. DAVIS; JAMES L. DRINKWATER; ARTHUR B. FORD ARTHUR GRANTZ; BARRY F. HIRSHORN; H. MAHADEVA IYER, CHI-YU KING; STEPHEN L. LEWIS; ALLAN G. LINDH; DENNIS M. MANN; A. THOMAS OVENSHINE; BRENT D. TURRIN; CHESTER T. WRUCKE, Plaintiffs - Appellants,

v.

GALE NORTON, Secretary of the United States Department of the Interior, Defendant - Appellee.;

Before: REINHARDT, RYMER, and THOMAS, Circuit Judges.

ORDER

Judges Rymer and Thomas have voted to deny the petition for rehearing. Judge Reinhardt voted to grant the petition for rehearing. The panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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v.

GALE NORTON, Secretary of the United States Department of the Interior, Defendant - Appellee.;

Before: REINHARDT, RYMER, and THOMAS, Circuit Judges.

ORDER

Submission of this case is deferred pending the issuance of an opinion by the United States Supreme Court in Meachem v. Knolls Atomic Power Lab, No. 06-1505.

No. 08-1097

In the Supreme Court of the United States

DAVID P. ADAM, ET AL., PETITIONERS

v.

KEN SALAZAR, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's judgment that the Secretary did not violate the Civil Service Reform Act, 5 U.S.C. 7701 *et seq.*, or engage in age discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is unreported. The relevant opinions and orders of the district court (Pet. App. 16a-66a; App., *infra*, 1a-23a, 24a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2008. A petition for rehearing was denied on November 19, 2008 (Pet. App. 67a-68a). The petition for a writ of certiorari was filed on February 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are 14 former employees of the Geologic Division of the United States Geological Survey

(USGS), which is an agency within the United States Department of the Interior. In 1995, petitioners were released from the agency due to a reduction in force (RIF). Pet. 3. Petitioners allege that they were released because of age discrimination.

a. In 1993, the USGS formed a Transition Team to coordinate the agency's transition under the new presidential administration. Pet. App. 18a. The Transition Team prepared a report on the agency's future, which stated that "[s]ome segments of the USGS currently are suffering from an aging, high-grade workforce that has limited the organization's financial flexibility and restricted the influx of new ideas and talents." *Id.* at 18a-19a. The report also stated that "[a]n aging workforce is a critical problem that must be addressed earnestly and creatively before any strategic recruitment plan can be implemented." *Id.* at 19a.

In 1994, Dr. Gordon Eaton was appointed the new Director of the USGS. Immediately after his appointment, Dr. Eaton gave speeches at the Geologic Division's three major centers. In the speeches, Dr. Eaton referred to a poster that showed a dinosaur with the caption, "Which is scarier, change or extinction?" Pet. App. 20a. He also told the following riddle, which he had heard from members of the Transition Team: "What is the difference between Jurassic Park and the Geological Division of the Geologic Survey? * * * [O]ne is an amusement park filled with dinosaurs and the other is a movie." *Id.* at 20a-21a. After saying that, Dr. Eaton, who was then sixty-five years old, *id.* at 20a, said, "So those of you in my generation in the Geology Division, take that," *id.* at 21a. Dr. Eaton also lamented the lack of "bright new young active minds" in the agency. *Ibid.*

In the years prior to the 1995 RIF, the Geologic Division was facing a "challenge of limited financial resources." Pet. App. 27a. "[I]ncreases in funding for the science programs had not kept pace with increases in salary commitments, leading to declining availability of funds for operating expenses, or funds to purchase the equipment and supplies necessary to conduct the research that was the Geologic Division's mission." *Ibid.* By 1994, there were calls within the Geologic Division for "a RIF to reduce [its] salary commitments." *Id.* at 28a. In 1995, Dr. Eaton "made the decision to go forward with the RIF" after the House Appropriations Committee informed the Geologic Division that its budget would be significantly reduced. *Id.* at 29a. After that announcement, the Geologic Division held briefings on the RIF at its Menlo Park center. Employees received a flyer on the briefings that included a cartoon of a dog telling his mother, "You gotta help me, Mom * * *. This assignment is due tomorrow and Gramps doesn't understand the new tricks." *Id.* at 29a-30a. The flyer was prepared and distributed by Cynthia Ramseyer, a USGS secretary.

Neither the Transition Team nor Dr. Eaton nor Ms. Ramseyer was directly involved in the RIF.

b. The RIF was governed by federal regulations promulgated pursuant to the Civil Service Reform Act (CSRA). See 5 C.F.R. Pt. 351. In accordance with the regulations, the USGS carried out the planning and implementation of the RIF in several distinct stages. First, the agency had to categorize each position within the agency into "competitive levels." See 5 C.F.R. 351.403(a)(1) (1996). Each competitive level included positions that were generally interchangeable, "so that [the] agency may reassign the incumbent of one position

to any of the other positions [within the competitive level] without undue interruption." *Ibid.*

To ensure that all positions were assigned to proper competitive levels, the agency relied on "peer panels" of subject matter experts to review each position and place it in an appropriate competitive level. Pet. App. 33a. These panels "did not consider or discuss the ages of the incumbents of the positions." *Id.* at 34a.

The agency next developed staffing plans to determine what positions were needed to adequately staff the agency, keeping in mind the agency's financial constraints. Pet. App. 34a-36a. The initial staffing plans were developed by "Program Councils," which consisted of panels of management level employees in each of the Geologic Division's program offices. *Id.* at 34a-35a. These staffing plans were then modified by a central committee of 20 agency employees. *Id.* at 35a-36a. Age was not a factor in these decisions because the staffing plans were "unpopulated," meaning that they focused on specific positions, and not individual employees. *Id.* at 35a.

The agency next filled the staffing plans with particular employees from the competitive levels. When it had created the competitive levels, the agency had ranked incumbent employees holding positions within each level by a set of "retention factors" such as tenure, veterans preference, and years of government service. Pet. App. 31a. The staffing plans were "populated" according to those rankings, and "the employees whose positions were not placed on the staffing plans were released from their competitive levels." *Id.* at 37a. "There is no evidence" that this process accounted for "employees' ages." *Id.* at 36a.

Even when an employee had been released from his or her competitive level, the employee could under certain conditions take a lower-ranking job in a different competitive level and displace an employee who would otherwise be retained. See 5 C.F.R. 351.701 (1996). In determining whether specific employees were permitted to exercise such "assignment rights," the agency turned to a panel of subject matter experts, comprised of senior employees within the Geologic Division who were "chosen for their broad range of expertise and because they were highly respected." Pet. App. 38a. There was "no evidence that any of the [subject matter experts] considered or discussed the age of employees when they evaluated assignment rights." *Id.* at 40a.

After the staffing plans had been created, the agency learned that its funding would not be cut as drastically as it had feared. Pet. App. 40a. The agency therefore convened a committee to add certain positions back into the staffing plans. *Id.* at 40a-41a. There was "no evidence that age was considered or discussed" by this committee. *Id.* at 41a.

Petitioners were released from the agency as a result of the RIF. Pet. 3.

2. Pursuant to the Civil Service Reform Act, 5 U.S.C. 7701 *et seq.*, qualified federal employees may appeal adverse employment decisions to the Merit Systems Protection Board (MSPB or Board). If the employee alleges that the adverse action was unlawful for discriminatory and nondiscriminatory reasons, the appeal is designated a "mixed case." 5 U.S.C. 7702. While petitions for review of MSPB actions are ordinarily filed in the Court of Appeals for the Federal Circuit, 5 U.S.C. 7703(b)(1), in a "mixed case" judicial review of the final Board order must lie in a district court, see, *e.g.*, *Hayes*

v. *United States GPO*, 684 F.2d 137, 139-140 (D.C. Cir. 1982). The district court must review the discrimination claims de novo, 5 U.S.C. 7703(c), but the Board's conclusions with respect to the nondiscrimination claims are reviewed on the administrative record and are accorded significant deference, *ibid.*

Petitioners brought a "mixed case" against the agency before the MSPB. As is relevant here, they alleged age discrimination, in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a(a), which provides that "[a]ll personnel actions affecting employees * * * who are at least 40 years of age * * * shall be made free from any discrimination based on age." Petitioners also alleged several nondiscriminatory violations of the CSRA. 5 U.S.C. 7701 *et seq.* After a 91-day hearing, the MSPB sustained the agency's actions. App., *infra* 2a. It held that the agency had bona fide financial and reorganizational reasons for conducting the RIF, that the RIF was carried out in accordance with applicable regulations under the CSRA, and that each petitioner was properly separated from service. App., *infra*, 27a.

3. Petitioners then commenced suit against the Secretary of the Interior in district court in the Northern District of California, seeking review of, *inter alia*, the MSPB's decisions on their CSRA and age discrimination claims. The district court dismissed petitioners' CSRA claims on summary judgment. The court reviewed those claims under the deferential standard of review provided by 5 U.S.C. 7703(c), and found that the MSPB's decision was not arbitrary or capricious and was supported by substantial evidence. App., *infra*, 28a-49a.

The district court recognized that under 5 U.S.C. 7703(c), the MSPB's decision as to the discrimination

claims had to be reviewed de novo. App., *infra*, 3a. The court permitted those claims to proceed to trial. *Id.* at 4a-20a, 22a. After a two-week bench trial, the district court ruled in favor of the government on petitioners' discrimination allegations. As to petitioners' disparate treatment claims, the district court found that although petitioners introduced some evidence that the USGS's culture was "tainted with age-based discriminatory animus," there was no evidence that any of the relevant decisionmakers who participated in the RIF process were motivated by such animus or that any of the actions taken against petitioners was the result of discrimination. Pet. App. 60a-61a. As to each of the petitioners, the district court found that the agency had "legitimate, non-discriminatory reasons for separating" them. *Id.* at 61a; see also *id.* at 42a-57a (detailing the agency's non-discriminatory reasons for separating each petitioner).

For example, the court concluded that petitioner David Adam was separated not because of age discrimination, but because his particular specialty was no longer required. Pet. App. 56a-57a. Dr. Adam worked as a palynologist for the Global Change and Climate History Program, and specialized "in the climate history of the upper Cenozoic." *Id.* at 57a (citation omitted). He had also "designed a state-of-the-art pollen extraction laboratory with a refrigerated core storage unit" for the agency's Menlo Park offices, where he worked. *Ibid.* As the district court concluded, the agency "did not have enough positions for all of the people conducting such research." *Ibid.* Moreover, the agency "decided to use the long-term core storage facility in Denver, rather than the one in Menlo Park" because it was more established and had a permanent staff. *Ibid.* Thus, "[c]onsidering these factors, the Program Council decided not to

include a palynology position in Menlo Park on the staffing plan." *Ibid.* Later, a separate panel of subject matter experts determined that Dr. Adam was not entitled to retreat to a different position. *Ibid.* The court thus concluded as a factual matter that there was "no evidence that Dr. Adam's age was a factor" in either of these decisions. *Ibid.*

As to petitioners' disparate impact claims, the district court concluded that petitioners had not made a prima facie case of discrimination. While "[o]lder workers were more likely to have been negatively affected by the RIF than younger workers," that result did not by itself "suggest that age played a causal role in determining which employees were affected by the RIF, because it d[id] not account for other factors that may have influenced which employees were affected by the RIF." Pet. App. 41a. In particular, the court concluded that petitioners' proffered statistical evidence was flawed because it failed to account for the type of work an employee performed. *Id.* at 41a-42a. Moreover, the district court found that petitioners had failed to "isolate and identify the specific employment practice responsible for the disparate impact." *Id.* at 63a. The district court held that petitioners could not point to the entire RIF as a single employment practice. *Ibid.* Instead, the RIF was better conceived as a series of separate decisions made by the agency; for each of those decisions, there was no evidence of age discrimination. *Ibid.* The court further concluded that even if petitioners had made a prima facie case, they "would still not prevail." *Id.* at 64a. The agency had offered "a legitimate business reason for conducting the RIF"—namely, cost-cutting—and petitioners had not "identified any other course of action that [the agency] could have taken that

would have reduced the Geologic Division's salary obligations enough to generate the operating funds that it needed to meet its programmatic goals." *Ibid.*

4. The court of appeals affirmed in relevant part in an unpublished memorandum opinion. Pet. App. 1a-15a. The court rejected petitioners' contention that the district court should have applied "mixed-motive analysis" to their disparate treatment claims. *Id.* at 5a-6a. The court explained that mixed-motive analysis was inappropriate because the district court had found that the relevant decisionmakers in the RIF process had not acted according to any discriminatory animus. *Id.* at 6a.

The court of appeals also rejected petitioners' contention that they had made a prima facie case of discrimination on their disparate impact theory. The court observed that "analyzing the impact of a generalized policy is not specific enough," Pet. App. 7a (internal quotation marks omitted), and affirmed the district court's finding that "the reduction in force could be broken down into different elements and that statistical analysis of the reduction in force as a whole was thus insufficient to meet [petitioners'] burden." *Ibid.* The court of appeals acknowledged that the district court's application of the "business necessity" test was erroneous in light of this Court's decision in *Meacham* v. *Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008). Pet. App. 13a n.2. But the court of appeals judged that error harmless because the district court had correctly held that petitioners had not made a prima facie case of disparate impact. *Ibid.*

Finally, the court of appeals rejected petitioners' argument that the district court applied deferential review to their discrimination claims. The court of appeals concluded that the district court "properly separated the

CSRA claims from the discrimination claims and properly reviewed the discrimination claims de novo," as required by 5 U.S.C. 7703. Pet. App. 9a.

Judge Reinhardt dissented in part. Pet. App. 14a-15a. He would have held "that where there is irrefutable evidence of an officially sponsored culture of discrimination in a workplace, it is not necessary to demonstrate that the individual who ultimately undertook the challenged adverse employment action was motivated to do so by his own disciminatory animus." *Ibid.* He would therefore have "reach[ed] the merits of [petitioners'] mixed-motive claim and [found] discrimination in violation of the ADEA." *Id.* at 15a. He otherwise agreed with the majority's disposition of the remaining claims, including the CSRA and ADEA disparate impact claims. *Ibid.*

ARGUMENT

The petition for a writ of certiorari should be denied. The court of appeals' holding is correct, fact-bound, and does not implicate any significant questions of law or split of legal authority. None of petitioners' narrow challenges to the court of appeals' decision warrants review.[1]

---

[1] Petitioners also may have failed to perfect their appeal to the court of appeals. The district court entered a final judgment on September 30, 2004. Under Fed. R. App. P. 4(a)(1)(B), petitioners were required to file a notice of appeal within sixty days, by November 29, 2004. But the district court docket indicates that petitioners filed the notice of appeal one day late, on November 30, 2004. The Ninth Circuit Appellate Commissioner issued a report and recommendation concluding that petitioners' notice of appeal had been timely received, though in the wrong division of the district court. The government objected to the report and recommendation on the ground that petitioners had failed to provide tangible proof of any timely filing. The court of appeals,

1. Petitioners assert (Pet. 11-12) that the court of appeals' disparate-impact ruling contradicts this Court's decision in *Meacham* v. *Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008). That is incorrect.

In a disparate-impact suit under the ADEA, an employer may assert as an affirmative defense that the challenged employment decision was "based on reasonable factors other than age." 29 U.S.C. 623(f)(1). In *Meacham*, this Court held that the burden of persuasion for this defense lies with the employer. 128 S. Ct. at 2400. In doing so, the Court noted that the "business necessity" defense that applies in the Title VII context "should have no place in ADEA disparate-impact cases." *Id.* at 2404. According to petitioners, the judgment below was inconsistent with *Meacham* because the court of appeals "erroneously affirmed the district court's placement of the burden to prove 'business necessity' on the Petitioners." Pet. 13.

Petitioners' suggested disposition—vacatur and remand in light of *Meacham*, Pet. 11—is unnecessary because the court of appeals addressed the relevance of *Meacham*. Pet. App. 13a n.2. Petitioners' argument also lacks merit because the court of appeals properly regarded *Meacham* as irrelevant to petitioners' disparate impact claims. *Ibid.* To show discrimination on a disparate-impact theory under the ADEA, a plaintiff must first demonstrate that a facially neutral practice has a disproportionate impact on older workers. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). If a plaintiff fails to carry that threshold burden, there is no need for the employer

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however, never resolved the dispute: it did not adopt the report of the Appellate Commissioner or address the issue of appellate jurisdiction in its opinion.

to raise an affirmative defense, and *Meacham* does not come into play.

Here, the court of appeals affirmed the district court's finding that petitioners had failed to demonstrate "a significant disparate impact on older workers." Pet. App. 6a-7a. In particular, the court of appeals found no clear error in the district court's conclusion that petitioners' statistical evidence was flawed in two important respects. First, the analysis "failed to provide any meaningful evidence because it did not take into account the type of work performed by each employee." *Id.* at 7a. Second, it "failed to isolate and identify the specific employment practice responsible for the disparate impact." *Ibid.*

Moreover, the court of appeals went on to explain that even if the district court had erred by using the business-necessity-defense framework, the error would be harmless because the district court had correctly held that petitioners "failed to establish a prima facie case." Pet. App. 13a n.2. Accordingly, there is no basis for petitioners' assertion that the court of appeals did not account for *Meacham*.

2. Petitioners also contend (Pet. 13-17) that the court of appeals erroneously required them to establish their disparate-treatment claim through only direct evidence. That is incorrect.

Before the lower courts, petitioners indicated that their disparate-treatment claim rested on a "mixed-motive" theory. In a mixed-motive case, a plaintiff need only show that discrimination "played a motivating part in an employment decision," even if there were also legitimate considerations for the decision. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 244 (1989) (plurality opinion). The burden then shifts to the employer, which

"may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [discrimination] to play such a role." *Id.* at 244-245 (footnote omitted).

This Court has held that a Title VII plaintiff may establish a mixed-motive claim by either direct or circumstantial evidence, see *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 92 (2003), and it is currently considering whether the same rule should apply in the ADEA context, see *Gross* v. *FBL Fin. Group, Inc.*, No. 08-441 (argued Mar. 31, 2009). The government, in its amicus brief in *Gross*, argued that the ADEA should be interpreted in line with Title VII. See U.S. Amicus Br. at 20-25, *Gross* v. *FBL Fin. Group, Inc.*, No. 08-441 (Feb. 2, 2009). The Secretary thus agrees with petitioners that they were not limited to direct evidence in establishing their mixed-motive case.

Contrary to petitioners' suggestion, however, the court of appeals committed no legal error on this issue, and the Court's expected decision in *Gross* has no bearing on this case. The court below correctly recognized that, under mixed-motive analysis, the burden would shift to the employer only after the plaintiff has shown that "a protected characteristic was a motivating factor in the employment action." Pet. App. 6a (internal quotation marks omitted); see *Desert Palace*, 539 U.S. at 100-101. Because the district court, after a lengthy bench trial, found *no* evidence—direct or circumstantial—that age was a factor at all in any of the decisions affecting petitioners in the RIF, the court of appeals correctly determined that there was no reason to shift the burden to the agency. Pet. App. 6a.

Petitioners' real dispute is with the court of appeals' *factual* conclusion. They allege that "evidence contained

in the district court findings" would have "support[ed] a finding of age discrimination." Pet. 17. But the court of appeals was not obligated to accept that reading of the record; it only had to conclude that the district court's finding was not clearly erroneous, Pet. App. 6a. And in any event, the district court's finding of no discrimination is borne out by the record. Indeed, as the district court noted, the very best evidence of discrimination that petitioners could muster related to isolated incidents by people who "did not play any role in deciding whether any of the Plaintiffs would be separated during the RIF." *Id.* at 61a.

Judge Reinhardt asserted in dissent that, even in the absence of any evidence that the people involved in the RIF acted out of discriminatory animus, petitioners were entitled to judgment as a matter of law because the evidence demonstrated a "culture of discrimination." Pet. App. 14a. Although petitioners quote that dissent (Pet. 15-16), even they do not urge such a sweeping rule. Instead they suggest that the agency's discriminatory culture, coupled with alleged circumstantial evidence of discrimination in the "implement[ation]" of the RIF, was sufficient to shift the burden to the agency. Pet. 16-17. The district court, however, as the trier of fact, was entitled to make its own determination as to whether the RIF decisions here were discriminatory, and the court of appeals properly regarded the district court's findings as not clearly erroneous. Pet. App. 6a. The fact-bound nature of petitioners' argument thus warrants no further review by this Court.

3. Petitioners also argue (Pet. 18-20) that their non-discrimination CSRA claims should have been reviewed de novo by the district court. That is incorrect.

On review of a "mixed case" of discrimination and nondiscrimination claims coming from the MSPB, a district court must apply a bifurcated standard of review. For the nondiscrimination claims, it must apply deferential review of the administrative record. 5 U.S.C. 7703(c). For the discrimination claims, it must apply de novo review. *Ibid.*

The district court in this case followed that scheme. It reviewed petitioners' nondiscrimination claims deferentially and rejected them on summary judgment. App., *infra*, 28a-49a. It then held a bench trial on petitioners' allegations of discrimination. After issuing its own fact findings, it rejected those claims. Pet. App. 16a-66a.

Petitioners' contention—that the district court should also have applied de novo review to their nondiscrimination claims, Pet. 19-20—is foreclosed by plain statutory language. Section 7703(b)(2) identifies three types of discriminatory claims that may be brought before the MSPB: those arising from Title VII, the ADEA, and the Fair Labor Standards Act. 5 U.S.C. 7703(b)(2). Section 7703(c) then provides that only those claims are "subject to trial de novo by the reviewing court." 5 U.S.C. 7703(c). Any other claims, such as petitioners' nondiscrimination claims here, must be reviewed deferentially. *Ibid.*

Petitioners, citing several courts of appeals decisions, suggest that "'mixed cases' involving discrimination as well as non-discrimination * * * are not bifurcated" on review. Pet. 20-21. Those cases, however, hold only that a district court may exercise jurisdiction over an entire "mixed case." See, *e.g.*, *Hayes* v. *United States GPO*, 684 F.2d 137, 140-141 (D.C. Cir. 1982). But they do not alter the bifurcated nature of review. See *id.* at 141 (stating that an employee "may bring his entire mixed

case before the district court for review *de novo* of the discrimination claim, and review on the record of his nondiscrimination claim").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 2009

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-2094 CW

DAVID P. ADAM, ET AL., PLAINTIFFS

v.

GAIL A. NORTON, SECRETARY, U.S. DEPARTMENT OF INTERIOR, DEFENDANT

[Filed: May 31, 2002]

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Gail Norton moves for summary judgment on Plaintiffs' claims that their termination from employment with the United States Geological Survey (USGS) violated the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act (Title VII). Plaintiffs oppose the motion. The issue presented by this motion is whether there is sufficient evidence in the record to establish a disputed question of fact as to whether Defendant designed and implemented the October, 1995 reduction in force (RIF) in a manner that discriminated on the basis of age, sex, national origin, and/or veteran status. The matter was heard on May 10,

2002. Having considered all of the papers filed by the parties and oral argument on the motion, the Court grants the motion in part and denies it in part (Docket #142).

BACKGROUND

On October 15, 1995, the USGS reduced its workforce by thirty-seven percent, resulting in the separation, retirement or transfer of 541 USGS employees, the demotion of 119 more, and the reassignment of 124. Declaration of Mary Dryovage (Dryovage Dec.), Ex. F. Sixteen of the individual Plaintiffs in this action were separated from service and the seventeenth Plaintiff was demoted as part of the October 15 RIF.

Each of the Plaintiffs litigated the adverse employment action taken against them in a consolidated proceeding before the Merit Systems Protection Board (MSPB). After a ninety-one day hearing, the Administrative Law Judge (ALJ) upheld the separation of the Plaintiffs against claims that 1) the RIF violated the Civil Service Reform Act (CSRA); 2) the RIF regulations were applied improperly to the individual Plaintiffs; and 3) Defendant unlawfully discriminated against Plaintiffs based on age and on age in combination with other protected characteristics. The MSPB decision was appealed to this Court. On January 27, 2000, Defendant moved for summary adjudication of the first two claims decided by the ALJ—whether Defendant's implementation of the RIF and separation of Plaintiffs violated the CSRA.

On May 17, 2001, the Court affirmed the decision of the ALJ, holding that the ALJ's conclusions were supported by substantial evidence and were not "arbitrary and capricious." *See* "Order Granting Defendant's Mo-

tion for Partial Summary Judgment, Denying Plaintiffs' Rule 56(f) Request, and Denying Motions to strike," (Partial Summary Judgments, Order) at 6, 31.

Defendant now moves for summary judgment on Plaintiffs' remaining claim for discrimination. As the Court noted in its previous order, "MSPB decisions on discrimination issues are reviewed de novo." Partial Summary Judgment Order at 6 (citing 5 U.S.C. § 7703 (c) and *Sloan v. West*, 140 F.3d 1255, 1260 (9th Cir. 1998)).

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The

substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the nonmoving party's claim. *Id.*; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), cert. denied, 502 U.S. 994 (1991). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the opposing party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan*, 929 F.2d at 1409. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323.

DISCUSSION

Plaintiffs argue that they have raised disputed questions of material fact sufficient to withstand summary judgment under either a disparate treatment or a disparate impact discrimination theory. The distinction between these theories of discrimination is well established.

Disparate treatment is the most easily understood type of discrimination. The employer simply treats

> some people less favorably than others because of their race, color, religion or other protected characteristics. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Claims that stress disparate impact by contrast involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate-impact theory.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (citing *Teamsters v. United States*, 431 U.S. 324, 335-336, n.15 (1977)).

A. Disparate Treatment

1. Legal Standard

"The burden on summary judgment of a plaintiff asserting disparate treatment under Title VII [or the ADEA] is . . . to establish a *prima facie* case of discrimination and, if the employer articulates a legitimate, nondiscriminatory reason for its actions, to raise a genuine factual issue as to whether the articulated reason was pretextual." *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Sischo-Nownejad v. Merced Community College*, 934 F.2d 1104, 1199-10 & n.7 (9th Cir. 1991) (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)).

Within this framework, a plaintiff may establish a *prima facie* case of discrimination with circumstantial evidence: a plaintiff must show that he or she is a member of a protected class; that he or she was qualified for

the position he or she held or sought; that he or she was subjected to an adverse employment decision; and that he or she was replaced by someone who was not a member of the protected class or that the circumstances of the decision otherwise raised an inference of discrimination. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) (citing *McDonnell Douglas*). Once the plaintiff establishes a *prima facie* case, a presumption of discriminatory intent arises. *Id.* To overcome this presumption, the defendant must come forward with a legitimate, nondiscriminatory reason for the employment decision. *Id.* at 506-07. I f the defendant provides that explanation, the presumption disappears. See *id.* at 511; *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).

In response to the defendant's offer of a nondiscriminatory reason, the plaintiff must produce either "specific, substantial evidence of pretext, *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983), or some "direct evidence of discriminatory motive." *Godwin v. Hunt, Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998).

If, in order to survive summary judgment, the plaintiff puts forward evidence of pretext, that evidence must be sufficient to raise a genuine issue of material fact as to whether the reason the employer articulated is a pretext for discrimination. The plaintiff may rely on the same evidence used to establish a prima facie case or put forth additional evidence. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000); *Wallis*, 26 F.3d at 892. "[I]n deciding whether an issue of fact has been created about the credibility of the employer's nondiscriminatory reasons, the district court must look at the evidence supporting the *prima facie* case, as well as the

other evidence offered by the plaintiff to rebut the employer's offered reasons. And, in those cases where the *prima facie* case consists of no more than the minimum necessary to create a presumption of discrimination under *McDonnell Douglas*, plaintiff has failed to raise a triable issue of fact." *Wallis*, 26 F.3d at 890. "[T]he plaintiff 'must tender a genuine issue of material fact as to pretext in order to avoid summary judgment.'" (quoting *Steckl*, 703 F.2d at 393). The factfinder's disbelief of the defendant's proffered reason, along with the elements of the prima facie case, may "suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511.

If, in response to the defendant's showing of a legitimate, nondiscriminatory reason, the plaintiff puts forth evidence of discriminatory motive, "the plaintiff need produce very little evidence . . . to raise a genuine issue of fact." *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991). For this reason, the Ninth Circuit has instructed that district courts must be cautious in granting summary judgment for employers on discrimination claims. *See Lam*, 40 F.3d at 1564 (" [w]e require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is one that can only be resolved through a "searching inquiry' —one that is most appropriately conducted by the factfinder'") (quoting *Sischo-Nownejad*, 934 F.2d at 1111).

Plaintiffs argue that the *McDonnell Douglas* burden shifting approach should not apply here for two reasons. First, Plaintiff notes that "the *McDonnell Douglas* test is inapplicable where the Plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Plaintiffs contends that because they have presented evidence of remarks

that could be construed as discriminatory, the analytic framework applicable to mixed-motive cases should apply here. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In other words, the evidentiary burden should shift to Defendant to show that it would have taken the same adverse employment action regardless of discriminatory animus.

The Ninth Circuit has made clear, however, that the *McDonnell Douglas* framework is applicable where the plaintiff has presented some comments from the employer that could be construed as discriminatory. *See Godwin*, 150 F.3d at 1221 (sales manager's comment that "he did not want to deal with another female" sufficient to satisfy the plaintiff's evidentiary burden at the pretext stage of the *McDonnell Douglas* analysis); *Bergene v. Salt River Project Agr. Imp. and Power Dist.*, 272 F.3d 1136, 1142 (9th Cir. 2001) ("small amount of direct evidence is necessary in order to create a genuine issue of material fact as to pretext"); *Chuang v. University of California Davis. Bd. of Trustees*, 225 F.3d 1115, 1128 (9th Cir. 2000) (plaintiff's direct evidence of discrimination analyzed under pretext prong of *McDonnell Douglas* test).

The issue presented is whether Plaintiffs have presented sufficient evidence to raise a jury question on whether discriminatory animus underlay the facially neutral evaluation criteria. The burden-shifting scheme of *McDonnell Douglas* is the appropriate framework in which to analyze this question.

In addition, Plaintiffs appear to argue that under *Reeves v. Sanderson Plumbing Products. Inc.*, 530 U.S. 133 (2000) summary judgment must be denied once the plaintiff establishes a prima facie case. *Reeves*, howev-

er, did not modify the burden shifting standard previously articulated by the Ninth Circuit and summarized above. The plaintiff must establish a prima facie case and, if the employer rebuts that case by articulating a legitimate, non-discriminatory reason, the plaintiff must present direct evidence of discriminatory motive or specific circumstantial evidence of pretext. *See Godwin*, 150 F.3d at 1220-1221; *Coleman*, 232 F.3d at 1284.

2. Prima Facie Case

To make out a prima facie case of discrimination, Plaintiffs must show that they were members of a protected class who were satisfactorily performing their jobs, that they suffered adverse employment actions, and that the circumstances of the adverse action raise an inference of discrimination.

Defendant argues that Plaintiffs Hirshorn and Turrin have not established a prima facie case because they were not members of the protected class. Specifically, Plaintiffs Hirshorn and Turrin were thirty-nine years old when they were separated pursuant to the RIF on October 15, 1995. *Polstorff v. Fletcher*, 452 F. Supp. 17, 23 (D.C. Ala. 1978) ("The Age Discrimination in Employment Act provides protection for persons between the ages of 40 and 65."); Declaration of Mary Beth Uitti (Uitti Dec.), Exs. A, B. Plaintiffs contend that although Hirshorn and Turrin were not in the protected class at the time of the RIF, they entered the protected class shortly thereafter and were eligible for positions filled after the RIF. Plaintiffs contend that both the initial RIF and the refusal to allow separated employees to "bump and retreat" into other positions violated the ADEA. Plaintiffs have not cited any evidende that Defendant refused to consider Plaintiffs Hirshorn and

Turrin for qualifying jobs that became available after the RIF. *See Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1422 (9th Cir. 1990) (refusal to transfer employee rather than layoff raises inference of discrimination only upon showing of differential treatment of employee outside the class). Consequently, there is no evidence of discriminatory treatment of Hirshorn and Turrin after they became members of the protected class. They have not, therefore, satisfied their burden of establishing a prima facie case.

Defendant does not dispute that the other fifteen Plaintiffs have established a prima facie case of age discrimination.

3. Legitimate Non-Discriminatory Reason

"A RIF is a legitimate nondiscriminatory reason for laying off an employee." *Coleman*, 232 F.3d at 1282; *see also Gianacualas v. Transworld Airlines, Inc.*, 761 F.2d 1391, 1395 (9th Cir. 1985) (general reduction in workforce as result of economic downturn constitutes "good cause" to terminate employment).

As detained in the Court's previous order, Defendant has presented evidence that the RIF was implemented for legitimate, budgetary reasons. *See* Partial Summary Judgment Order at 3, 7-9; *see also Cross v. Dept. of Transp.*, 127 F.3d 1443, 1447 (Fed. Cir. 1997) (agency may undertake cost cutting measures in anticipation of future cuts in funding). Defendant has also presented evidence that the RIF was designed and implemented without discriminatory intent and that it compiled with governing procedures. *See* Partial Summary Judgment Order at 10-12 (citing Administrative Record (AR) 919, 15292-93, 17792, 17380). This evidence satisfies Defendant's burden of showing a legitimate nondiscriminatory

reason for the adverse employment actions. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1996) (employer satisfied "burden by offering some evidence that a [*sic*] downturn in work required some layoffs, and that it used a combination of factors, including performance, technical qualifications, and seniority, in deciding whom to discharge").

At this point in the *McDonnell Douglas* analysis, the presumption of discriminatory intent "drops out of the picture." *Wallis*, 26 F.3d at 889 (quoting *Hicks*, 509 U.S. at 511). The burden shifts back [*sic*] Plaintiffs to "produce enough evidence to allow a reasonable factfinder to conclude" that Defendant's proffered explanation is false or that the true reason for the discharge was discriminatory. *Nidds*, 113 F.3d at 918.

4. Discriminatory Intent/Pretext

Plaintiffs may satisfy their burden by presenting either evidence of Defendant's discriminatory animus or evidence that the RIF was not legitimate or nondiscriminatory. Plaintiffs have presented [*sic*] *evidence* that falls into both categories. First, Plaintiffs have proffered comments from the director of the USGS and from those involved in implementing the RIF from which Plaintiffs contend a jury could infer discriminatory animus. In addition, Plaintiffs contend that the RIF was implemented in a manner biased against employees over the age of forty.

a) Discriminatory Intent

Dr. Gordon Eaton became the Director of USGS in early 1994 at the age of sixty-six. Prior to his appointment to this position, his supervisor, former Secretary of the Interior Bruce Babbit, expressed to Dr. Eaton his

concerns about the direction of the USGS. According to Dr. Eaton, Secretary Babbit believed that the USGS had been inadequately "responsive to change in terms of national need [and] societal concerns." Dryovage Dec., Ex. K 11:8-10. Secretary Babbit was also concerned that "there had been inadequate development of . . . leadership among the young people" in the organization. *Id.* at 11:14-16. Dr. Eaton set out to address these concerns. *Id.* at 11:25-12:2.

Within two weeks of being appointed, Dr. Eaton visited the three main USGS centers, located in Menlo Park, California; Denver, Colorado; and Reston, Virginia. At each visit, he gave a presentation to the staff that lasted between forty-five minutes and one hour and was followed by a question and answer period. Prior to the Menlo Park meeting, Dr. Eaton was given a poster, which he described to the Menlo Park staff during his presentation. The poster showed a bewildered looking dinosaur with the caption, "Which is scarier, change or extinction." *Id.* at 70:10-15. In his second meeting, in Denver, Dr. Eaton again described the poster to the staff and, in addition, made the following comment in reference to the challenges facing the USGS:

> The transition team . . . visited in a number of different places and along the way they heard some things from members of the Geologic Division which sounded to them like intransigency and an unwillingness to change even an unwillingness in fact to embrace it, and while that clearly is not true for the whole Geologic Division *I would have to argue that some of the people that I know and love the most that are of my generation within the organization may have been the very ones that said the things that lead*

> *them to pose the question*, "What is the difference between Jurassic Park and the Geologic Division in the Geological Survey?" And you've probably heard the answer. The answer is, "One is an amusement park filled with dinosaurs and the other is a movie." *So, those of you in my generation in the Geologic Division, take that.*

(emphasis added). In Reston, Dr. Eaton repeated the "Jurassic Park" joke. Plaintiffs contend that Dr. Eaton's "dinosaur comments" indicate stereotyping of older employees as resistant to change and express Dr. Eaton's desire to replace these older employees with younger employees.

In addition, in March, 1995, at the beginning of the RIF process, all employees of the geologic division were advised to attend a briefing "about the coming reductions in force." *Id.*, Ex. E. The notice announcing the briefing included a one-panel cartoon of a dog, holding a piece of paper and speaking to a larger dog while an obviously older dog sits in the corner reading a newspaper. The caption on the cartoon reads, "You gotta help me, Mom. . . . This assignment is due tomorrow and Gramps doesn't understand the new tricks." *Id.* This cartoon appears to be a reference to the cliche, "you can't teach an old dog new tricks." Plaintiffs contend that it is susceptible to the inference that those implementing the RIF would be biased against older employees because of their perceived reluctance to adjust to changes in the workplace.

Last, as evidence that the RIF was implemented with discriminatory intent, Plaintiffs proffer a memorandum outlining the "Ground Rules for Reduction in Force" written by Chief Geologist P. Patrick Leahy and distrib-

uted on June 19, 1995. *Id.* Ex. E. In this memo, Leahy details the policies he established within the statutory and regulatory context of an RIF. With respect to assignment rights (bumping rights), Leahy decided that no assignment rights would be permitted "beyond those required by law and regulation." *Id.* Ex. E. at 2. Leahy recognized that he had the discretion to grant assignment rights in a manner "that would expand bumping rights for most Division employees." *Id.*, at 4. He chose not to adopt this position, in part, because the "[e]mployees with least seniority would be most vulnerable to downgrading or separation. As a result, the remaining staff would include most of our highly experienced senior scientists, but many of the younger more recently trained staff would be lost." *Id.* Therefore, while "acknowledging that [the chosen bumping policy] denies senior staff an advantage we could have granted them," Leahy limited those employees' bumping rights. *Id.*

Defendant argues that Plaintiffs' evidence amounts to nothing more than "stray remarks" insufficient to raise an inference of discriminatory animus. *See Coleman*, 232 F.3d at 1284 (question of fact as to whether one manager described individual as "young and promotable" not sufficient to raise a material dispute with respect to whether employer's nondiscriminatory rationale was a pretext). In this context, Defendant's argument is unpersuasive. Plaintiffs have presented more than a single isolated comment "uttered in an ambivalent manner and not tied directly to the termination." *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993). Rather, they have presented sufficient evidence from which a factfinder could conclude that decision-makers in the agency, and particularly those involved in formulating and implementing the RIF, articulated a prohib-

ited, discriminatory animus. "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Godwin*, 150 F.3d at 1221; *see also Lindahl*, 930 F.2d at 1438 ("plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact").[1]

The evidence detailed above satisifes Plaintiffs' burden under *McDonnell Douglas*. They have presented sufficient evidence to create a material dispute concerning Defendant's motivation in taking the adverse employment action.

b) Pretext

Because Plaintiffs have satisfied their burden at this stage of the *McDonnell Douglas* analysis by presenting sufficient evidence of discriminatory motive, they need not present "specific, substantial evidence" of pretext as well. *See supra Nidds*, 113 F.3d at 918 (to withstand summary judgment, the plaintiff "must produce enough evidence to allow a reasonable factfinder to conclude either: (a) that the alleged reason for Nidds' discharge was false or (b) that the true reason for his discharge was a discriminatory one"). Nevertheless, Plaintiffs also argue that Defendant's contention that the RIF was legitimate and nondiscriminatory is not worthy of credence.

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[1] Defendant also argues that, viewed in context, Dr. Eaton and others in management were encouraging employees of the USGS to change "in order to meet the agency's changing missions and societal needs." Defendant's Reply at 3. Although Eaton's comments are susceptible to this interpretation, Plaintiffs have presented sufficient evidence from which a factfinder could infer discriminatory animus.

In arguing that the RIF was a pretext for discrimination, Plaintiffs have focused specifically on the cases of Csejtey, Ford, Grantz, and Wrucke. The essence of the arguments made by these Plaintiffs is that they were qualified for their positions, and their separation from employment during the RIF was unjustified and constitutes evidence of pretext. These claims are not sufficient to establish pretext. *See Casillas v. Navy*, 735 F.2d 338 (9th Cir. 1984) (Title VII does not ensure that the best candidate is chosen, only that the selection process is free of discrimination).

Plaintiff Csejtey also contends that although Defendant claims the project he was working on was terminated, in fact, an identical project was implemented during the RIF. However, the evidence in the administrative record indicates that the new project was dissimilar and the location of the project was moved to Alaska. AR 21314-21361.

Plaintiff Wrucke contends that Defendant placed him in the wrong "competitive level code" (CLC) and that this erroneous CLC led to this separation. However, the record indicates that the CLC sought by Wrucke was dissimilar to his current duties.

B. Disparate Impact

1. Legal Standard

In order to state a prima facie disparate impact claim, plaintiffs must show "that a facillay neutral employment practice has a 'significantly discriminatory' impact upon a protected class." *See Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1076 (9th Cir. 1986) (citing *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)). The prima facie case has three elements. The

plaintiff must 1) show a significant disparate impact on a protected class or group, 2) identify the specific employment practices or selection criteria at issue, and 3) show that the disparity is linked to the challenged policy or practice. *Hemmings v. Tidyman's Inc.*, —F.3d—, 2002 WL 537689 at *11 (9th Cir. 2002) (citing *Antonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1482 (9th Cir. 1987)). If the employee establishes a prima facie case of disparate impact, the burden shifts to the employer to prove that the challenged practice is job-related for the position an consistent with business necessity. If the employer meets its burden of showing "business necessity," the burden shifts back to the employee to show that the same goal could be accomplished with less adverse impact upon the protected class. *Coleman*, 232 F.3d at 1291.

2. Statistical Evidence

Defendant contends that Plaintiffs have failed to satisfy two of the three criteria necessary to establish their prima facie case.

First, Defendant argues that Plaintiffs failed to identify in their pleading the "specific, identified employment practice or selection criteria" responsible for the disparty. *Stout v. Potter*, 276 F.3d 1118, 1121 (9th Cir. 2002). However, as the Supreme Court recently held in the related context of disparate treatment, the burden of establishing a prima facie case "is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Soreman*, 122 S. Ct. 992, 997 (2002). Title VII and ADEA violations are sufficiently plead if the complaint alleges that the plaintiff was "terminated . . . on account of his age, detail[s] the events leading to the termination, provide[s] relevant dates, and include[s] the

ages . . . of at least some of the relevant persons involved. . . . " *Id.* at 999.

This standard was met in the present case, and the relevant question at this stage in the proceeding is whether Plaintiffs have submitted sufficient evidence that a specific employment practice was responsible for the alleged disparate impact on the protected class. Plaintiffs have sufficiently identified the policies and practices within the RIF that they contend had a disparate impact. These policies include, but are not limited to, the narrowing of competitive level codes, the limiting of assignment rights, and the use of "add back" lists. Based on this evidence, the Court concludes that Plaintiffs have satisfied the second requirement of a prima facie case: they have identified specific employment practices that they claim have had a disparate impact on the protected class. The statistical disparity, moreover, is significant enough to raise an inference of causation. AR 11959, 11964; *Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-96 (1988)).

Defendant also argues that Plaintiffs have not satisfied their prima facie case because the statistical evidence they presented is so flawed that is it insufficient to establish a disparate impact on the protected class. Specifically, Defendant contends that Plaintiffs' statistical analysis failed to account for several relevant factors.[2] In support of this contention, Defendant relies on

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[2] Defendant also contends that Plaintiffs' statistical sample was too small. *See Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002) ("the probative value of any statistical comparison is limited by the small available sample"). In *Stout*, however, the data set consisted of thirty-eight applicants for five positions. In the present case, Plaintiffs compared

Coleman v. Quaker Oats Company, where the plaintiffs presented statistical evidence suggesting that twice the percentage of employees over the age of forty were laid off during a RIF as those under the age of forty. 232 F.3d at 1281. The court, however, found the plaintiffs' statistics unreliable because they did "not take into account any variable other than age." *Id.*

In this case, Defendant argues that Plaintiffs' statistical analysis is equally unreliable because it failed to consider the factors of grades, length of service and performance. However, Defendant "cannot defeat [a statistical] showing of discrimination simply by pointing out possible flaws in [the] data. Rather, [the defendant] had to produce credible evidence that curing the alleged flaws would also cure the statistical disparity." *Equal Employment Opportunity Comm'n v. Gen. Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 582-83 (9th Cir. 1989); *see also Coleman*, 232 F.3d at 1281 (when other variables were considered the results were "far less dramatic" and "not even significant"). Defendant has not produced such evidence in support of this motion. Instead, Defendant relies on the conclusions reached by the ALJ at the MSPB hearing. The ALJ credited the testimony of Defendant's expert over that of Plaintiffs'. The ALJ, however, did not find that Plaintiffs' statistical showing was insufficient as a matter of law—the showing required of Defendant to succeed on this motion for summary judgment. Rather, after reviewing the reports and testimony of both Plaintiffs' and Defendants's experts, the ALJ concluded, "I find the [Plaintiffs'] statistical evi-

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the 550 positions eliminated to the total workforce of approximately 2000 employees.

dence less persuasive than the testimonial and statistical evidence provided by the agency." AR 17813.

To satisfy the prima facie case in a disparate impact case, "the law does not require the near-impossible standard of eliminating all possible nondiscriminatory factors." *Hemmings*, 2002 WL 537689 at *9. Rather, so long as Plaintiffs' analysis is not "so incomplete as to be inadmissible as irrelevant," *see Bazemore v. Friday*, 478 U.S. 385, 400 n.10 (1986), complaints about the" inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility." *Hemmings*, 2002 WL 537689 at *9. Defendant has not shown that the inclusion of factors allegedly omitted by Plaintiff's statistical expert would eliminate the age-based statistical disparity. Consequently, Plaintiffs' and Defendant's conflicting statistical evidence must be presented to the factfinder.

Defendant also contends that it has presented evidence of a "business necessity" that is unrebutted by Plaintiff. Specifically, Defendant contends that "the goals of saving money and meeting the changed mission of the agency could [not] have been met by any means other than by the RIF." Reply Brief in Support of Defendant's Motion for Summary Judgment at 6. However, Defendant has failed to satisfy its burden of showing why the means used in the RIF were necessary, not simply that the RIF was a necessity.

C. Individual Claims

In addition to the age discrimination claim common to all Plaintiffs, several Plaintiffs also bring claims of discrimination based on factors other than age. Plaintiff Wrucke alleges discrimination on the basis of his veteran status. Plaintiffs Adam, Lewis, Lindh, and Turrin

allege retaliation under Title VII. Plaintiffs Csejtey, Iyer, and King allege national origin discrimination. And, Plaintiff David alleges discrimination on the basis of sex.

The Court grants Defendant's motion for summary judgment on Plaintiff Wrucke's veteran's rights claim because veterans are not a protected class under Title VII or the ADEA.

The Court grants Defendant's motion for summary judgment with respect to Plaintiffs Lewis, Lindh, and Turrin's retaliation claims. In order to state a claim for retaliation under Title VII or the ADEA, the plaintiff must allege that he or she engaged in activity protected by Title VII or the ADEA. Plaintiffs Lewis, Lindh and Turrin contend that they were retaliated against for whistle blower complaints unrelated to Defendant's alleged violations of Title VII or the ADEA. Consequently, their claims for retaliation are not viable as a matter of law.

Plaintiff Adam contends that he was laid off during the October 15 RIF, in part, as reprisal for a letter he had written in 1985 supporting a grievance filed by a female co-worker. Plaintiff Adam has failed to establish a causal connection between the 1985 letter and the 1995 separation. He therefore has not established a prima facie case of retaliation. *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1264 (9th Cir. 1997) (prima facie case of retaliation requires a showing of a causal link between the protected activity and the employer's adverse action).

Defendant's motion for summary judgment is granted with respect to Plaintiffs Csejtey, Iyer, and King's national origin discrimination claims. Although Plain-

tiffs have established a prima facie case, they have not come forward with evidence to show that the RIF was a pretext for national origin discrimination. The evidence supporting Plaintiffs' age discrimination claims is not probative of national origin discrimination and Plaintiffs have not presented evidence from which a trier of fact could choose to disbelieve Defendant's legitimate, non-discriminatory explanation for their separation. For the same reason, Defendant is entitled to summary judgment on Plaintiff Davis' sex discrimination claim.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is granted in part and denied in part (Docket #142). There is a disputed question of material fact with respect to whether Defendant intentionally discriminated against employees over the age of forty when it designed and implemented the October 15, 1995 RIF. There is also a dispute of material fact with respect to whether the RIF had an impermissible disparate impact on a protected class of employees over the age of forty.

Summary judgment in [*sic*] granted with respect to Plaintiffs Hirshorn and Turrin's age discrimination claims because they were not in the protected class at the time of the RIF. Summary judgment is also granted on Plaintiffs Lewis, Lindh, Turrin and Adam's retaliation claims, Plaintiff Wrucke's veteran's rights claim, Plaintiff Davis' sex discrimination claim and Plaintiffs Csejtey, Iyer and King's national origin discrimination claims.

Dated: [May 31, 2002]

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 98-02094

DAVID P. ADAM, LANDFORD H. ADAMI, JAMES P. CALZIA, BELA CSEJTEY, JR., ALICE S. DAVIS, JAMES L. DRINKWATER, ARTHUR GRANTZ, BARRY F. HIRSHORN, H. MAHADEVA IYER, CHIRON-YU KING, STEPHEN L. LEWIS, ALLAN G. LINDH, DENNIS M. MANN, A. THOMAS OVENSHINE, BRENT D. TURRIN, CHESTER T. WRUCKE, PLAINTIFFS

v.

GALE A. NORTON, SECRETARY, U.S. DEPARTMENT OF INTERIOR, DEFENDANT

[May 17, 2001]

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING PLAINTIFF'S RULE 56(F) REQUEST, AND DENYING MOTIONS TO STRIKE

Defendant Gale A. Norton, Secretary of the United States Department of Interior, moves for partial summary judgment on Plaintiffs' Civil Service Reform Act (CSRA) claims and moves to dismiss Plaintiffs Hirshorn and Turrin's claims. Plaintiffs oppose this motion. Before the Court is Plaintiffs' complaint for judicial review of the decision of the Merit Systems Protection Board

(MSPB) that they were properly separated from the Geological Division (Division) of the United States Department of the Interior (Agency) and that their positions were properly downgraded as a result of the Agency's 1995 reduction-in-force (RIF).

On April 23, 1999, Defendant filed a motion for partial summary judgment on Plaintiff Adam's CSRA claims, and Plaintiff Adam filed a cross-motion for partial summary judgment. Rather than rule on these motions, the Court ordered Defendant to file a motion for summary judgment raising "all claims" that she believed were not subject to a genuine dispute of material fact and about which the other side "could, with due diligence, have completed sufficient discovery to oppose by the date the opposition is due." In compliance with this order, on January 27, 2000, Defendant filed a motion for partial summary judgment on all of the Plaintiffs' CSRA claims. Defendant also moved to dismiss all of Plaintiffs Hirshorn and Turrin's claims. On May 12, 2000, Plaintiffs opposed this motion, although they did not file a cross-motion for partial summary judgment. Plaintiffs also requested relief pursuant to Federal Rule of Civil Procedure 56(f). Defendant filed a reply. Plaintiffs then filed a surreply, which was improper because they had not filed a cross-motion. However, rather than strike Plaintiffs' surreply, the Court allowed Defendant also to file a surreply. The parties also filed motions to strike various portions of the pleadings and declarations filed in support of and opposition to Defendant's January 27, 2000 motion for partial summary judgment.

The matter was heard on September 29, 2000. The Court has considered all papers filed in response to the briefing schedule set forth in the October 5, 1999 Order,

including both parties' Motions To Strike and surreplies, and oral argument on motion. The Court GRANTS Defendant's Motion For Partial Summary Judgment, DENIES Plaintiffs' Motion for Relief Pursuant to Rule 56(f), and DENIES the motions to strike filed by both parties. Further, the Court denies as moot the parties' earlier cross-motions for partial summary judgment, which were superseded by the present motion.

STATEMENT OF FACTS

I. General Background

In the mid-1980s, the Division began to have financial problems because its budgets did not keep pace with increasing inflationary costs. In 1991, after years of financial difficulties with Congressional budget cuts and escalating costs, the Division received significantly less funding and its financial difficulties became more acute. The Division instituted measures to address the funding crisis, including a hiring freeze, termination of temporary appointments, offers of early retirement and buyouts. *See* Administrative Record (AR) at 15321. Despite these efforts, the Division continued to suffer financial difficulties. From 1992 to 1994, the Chief Geologist circulated various memoranda within the Division about the need to reduce staffing. Ultimately, in October, 1995, the Division conducted a RIF in which 550 scientists, approximately thirty-seven percent of its workforce, including Plaintiffs, were separated from federal service or downgraded.[1] As provided by 5 U.S.C.

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[1] Plaintiff Allan G. Lindh was not separated from service but his position was downgraded from a GS-15 Geologist to a GS-12 Geologist. *See* AR 31115. Plaintiff Dennis Mann continues to work for the Division

§§ 7702, 7703, in November, 1995, Plaintiffs sought review with the MSPB of their separations.

II. The MSPB Decision

The MSPB hearing included ninety-one days of testimony and generated 175 volumes of record. The MSPB Judge wrote separate opinions for each Plaintiff, a total of seventeen. Ultimately, the MSPB Judge found that the Division had bona fide financial and reorganizational reasons for the 1995 RIF. Furthermore, the MSPB Judge concluded that the RIF was carried out in accordance with CSRA standards and that each Plaintiff was either properly separated from federal service or properly downgraded to another position.

During the MSPB review of their separation from federal service, Plaintiffs claimed that Defendant unlawfully discriminated against them based on age, sex, national origin, and/or race, and/or retaliated against them for their opposition to unlawful discrimination, and violated their rights under the CSRA. Plaintiffs made identical claims challenging the validity of the 1995 RIF as a whole and made claims specific to their individual employment situations.

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following his settlement of his RIF claims during administrative proceedings. *See* Decl. of Mary Beth Utti In Opposition to Pl.s' Motion To Amend Complaint, C1 and C2.

DISCUSSION

I. Motion For Partial Summary Judgment

A. Legal Standard For Summary Judgment

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *See Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident and Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those that, under applicable substantive law, may affect [*sic*] outcome of the case. The substantive law will identify which facts are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Legal Standard for Review of MSPB Hearing

Employees or applicants for employment who are adversely affected by a final order or decision of the MSPB may obtain judicial review of the order in the United States Court of Appeals for the Federal Circuit. *See* 5 U.S.C. §§ 7702, 7703; 5 C.F.R. § 1201.119 (1991); *id.* § 1201.120 (1998). Under 5 C.F.R. § 1201.175, the district court has jurisdiction over requests for judicial review of cases involving claims of discrimination described in 5 U.S.C. § 7702. This includes actions alleging discrimination prohibited by §§ 12 and 15 of the ADEA and Title VII of the Civil Rights Act of 1964. In addition, under §§ 7702 and 7703, the district court may review MSPB decisions in "mixed cases," defined as cases in which the underlying adverse action is appealable to the MSPB and the discrimination described in § 7702 is alleged as a basis for the adverse action. *Romain v. Shear*, 799 F.2d 1416, 1421 (9th Cir. 1986); *see Williams v. Department of Army*, 715 F.2d 1485, 1486 & n.3 (Fed. Cir. 1983).

In deciding mixed cases, district courts must review the MSPB's determination of issues other than discrimination based on the administrative record, under a deferential standard of review. *See* 5 U.S.C. § 7703(c); *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1482 (Fed. Cir. 1998); *Sloan v. West*, 140 F.3d 1255, 1260 & n.16 (9th Cir. 1998). Pursuant to 5 U.S.C. § 7703(c), district courts must affirm the MSPB's findings regarding issues other than discrimination unless a review of the record reveals that those decisions are (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (2) made in violation of procedures required by law, rule or regulation, or (3)

unsupported by substantial evidence. *See* 5 U.S.C. § 7703 (c). MSPB decisions on discrimination issues are reviewed *de novo*. *See* 5 U.S.C. § 7703 (c); *Sloan*, 140 F.3d at 1260 and n.16; *Morales v. Merit Systems Protection Board*, 932 F.2d 800, 802 (9th Cir. 1991); *Romain*, 799 F.2d at 1421 (explaining the difference in judicial treatment of the two types of claims in mixed cases).

C. Plaintiffs' Common Claims

Plaintiffs assert that in order for this Court to adjudicate Defendant's motion for summary judgment on Plaintiffs' CSRA claim, the Court will be required to rule on Plaintiffs' discrimination claims. This is not the case. Plaintiffs have alleged a "mixed case," with allegations of discrimination coupled with allegations of other wrongs. Therefore, the Court may properly consider Plaintiffs' claims of other wrongs based on the administrative record separately from Plaintiffs' discrimination claims, which the Court will review *de novo*. Thus, in this order, the Court will not consider any of Plaintiffs' discrimination claims, including Plaintiffs' claims that they were retaliated against for discriminatory reasons, and will rule only on Defendant's motion for summary judgment regarding whether the Division instituted the RIF and separated Plaintiffs in accordance with the CSRA.

Plaintiffs also assert that this Court should review *de novo* the MSPB Judge's decision on Plaintiffs' claims of wrongs other than discrimination. However, as explained above, Plaintiffs are mistaken.

1. Division's Financial Reasons for RIF

Plaintiffs allege that the Division's financial difficulties were "bogus" and a "spurious reason" for the reorganization and RIF because the Division's cost shifting and buyouts should have corrected its earlier financial difficulties.[2] *See* Pl.s' First Amended Complaint, 9. Plaintiffs allege that the MSPB Judge failed to consider evidence of the Agency's financial healthiness in the 1996 fiscal year, including the facts that the Agency allocated millions of dollars to contracts for equipment and/or services, that many of the employees who were not separated in the 1995 RIF received performance awards at the end of the year, and that there was a financial surplus in the Agency's Capital Fund for the 1996 fiscal year. Plaintiffs claim that the witnesses who testified about the financial problems of the Division did not give credible testimony. Furthermore, Plaintiffs dispute Defendant's claim of financial difficulties that relate back to the 1995 RIF. Lastly, Plaintiffs allege the Division's executives knew that Congress was not going to decrease its budget significantly for fiscal year 1996 and they nonetheless conducted the RIF in order to separate certain people from federal service, including Plaintiffs.

The Code of Federal Regulations sets forth the standard for a federal agency to conduct a RIF. Pursuant to 5 C.F.R. § 351.201(a)(2), a federal agency may "release a competitive employee from his or her competitive level by . . . separation . . . when release is required because of . . . shortage of funds." 5 C.F.R.

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[2] Although Plaintiffs do not distinguish between the financial healthiness of the Agency as opposed to the Division, the MSPB Judge considered the financial healthiness of the Agency as well as that of the Division.

§ 351.201(a)(2). The determination that a RIF is proper is "a matter of the agency's independent managerial discretion." *Cross v. Department of Transportation*, 127 F.3d 1443, 1447 (Fed. Cir. 1997). When conducting a RIF because of lack of funding, the agency need not wait until a shortage of funding exists but it may take the appropriate action upon becoming aware of imminent legislation which will affect its funding. *See id.*

The MSPB Judge found that the Division conducted the 1995 RIF in response to ongoing financial difficulties that were expected to further deteriorate. *See* AR 17788. The MSPB Judge reasonably relied on the Agency's financial documents pertaining to the Division and testimony of many of the Division's officials, including testimony by some Plaintiffs. Plaintiffs' claim that the MSPB Judge relied on witnesses who did not give credible testimony is unavailing. Credibility determinations made by the MSPB Judge are "virtually unreviewable." *See Hambsch v. Dept. of Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986).

The MSPB Judge considered that the Division had been having financial difficulties since the 1980s, that these problems became increasingly worse in the early 1990s, and that the Division had attempted to remedy its financial problems. Nevertheless, even after the 1994 buyout, the MSPB Judge noted that the Division found a RIF essential to its economic survival. *See* AR 15321-23. Thus, the MSPB Judge reasonably concluded that there were bona fide financial reasons for the RIF. *See* AR 17788.

2. Procedures Used in the Reorganization

Chapter 5 Code of Federal Regulations Section 351.201(a)(l) provides,

> Each agency is responsible for determining the categories within which positions are required, where they are located, and when they are to be filled, abolished, or vacated. This includes determining when there is a surplus of employees at a particular location in a particular line of work.

5 C.F.R. § 351.201(a)(1). Federal agencies hold the power to make determinations about the retention or elimination of positions within them. *Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984). When conducting a RIF, the federal agency establishes competitive levels in which employees compete for retention by the agency in accordance with 5 C.F.R. § 342.5403(a), which provides,

> (1) Each agency shall establish competitive levels consisting of all positions in a competitive area which are in the same grade (or occupational level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption. (2) Competitive level determinations are based on each employee's official position not the employee's personal qualifications.

Plaintiffs allege that certain managerial positions were created as sham positions to protect some managers from being separated during the RIF, that the Divi-

sion improperly returned some managers to science or research positions, and that managers were able to retain positions improperly without regard to programmatic needs. Plaintiffs claim that the managers improperly influenced the staffing plans. Plaintiffs also allege that the managers had improper influence over the subject matter experts (SMEs). The SMEs' role was to meet with personnel officials to determine the interchangeability of positions and to determine which employees would be assigned to the positions that the Division planned to retain after the RIF. Plaintiffs claim that the SMEs were not qualified and that they improperly destroyed their notes. Lastly, Plaintiffs allege that the Division improperly created competitive levels that were overly narrow in order to target certain individual scientists to be separated.

Defendant counters that the RIF was effectuated according to proper procedures, as set forth in 5 C.F.R. § 351.201(a)(1). Defendant asserts that the Division developed and implemented its reorganization and RIF as follows: by developing the general priorities of the Division, including developing five-year plans of its scientific goals, developing staffing plans in accordance with those priorities, reviewing all position descriptions to assess which, if any, were the best match for the identified needs, and setting up a multi-level review and oversight process. Defendant asserts that every abolished position was discussed during the review process in an attempt to place it with one of the Division's programs. Defendant also argues that although managers were involved in the development of staffing plans, reviewed changes made to position descriptions, and made recommendations on which positions were retained, there is no

evidence that managers exerted improper influence over the SMEs. Defendant argues that the SMEs were qualified and were not required to retain their notes. Lastly, Defendant argues that the competitive levels were properly developed in accordance with 5 C.F.R. 351.403(a).

In considering the process the Division followed in developing its reorganization plan, the MSPB Judge noted that Division officials were given a directive from then-Secretary of the Interior Bruce Babbitt that "the Agency needed to change." AR 17790. The MSPB Judge found that the Administrative Record includes evidence that the Division reorganized in two ways—streamlining management organization and realignment of programs.

The MSPB Judge agreed that the Division developed its reorganization plan by determining the Division's general goals and missions, developing science plans for ten scientific programs, developing and implementing staffing plans, and utilizing the multi-level review process. The Division's officials determined the general goals and missions of the Division by having SMEs and Division managers meet to consider them. Then the Division determined what scientific endeavors it would attempt to pursue in a five-year period. The Division prepared five-year plans which laid out its scientific goals. From these five-year plans, Program Councils were formed, which were comprised of the Program Coordinator and Branch Managers. The Program Councils then developed generic staffing plans, consisting of the types of positions needed to execute the program, reviewed the position descriptions relevant to that program, and determined which positions were the best match for the identified needs. The Division conducted

two independent reviews of its staffing plans, one by the Division Program and Staffing Plan Review Committee and one by upper level management and program coordinators, to ensure the plans adequately reflected the future of the Division and to determine if some positions identified for separation could be utilized in other areas. *See* AR 919, 15292-93, 17792, and 17380.

The MSPB Judge determined that the Division's decision to return all managers on rotational management assignments to their original science or research positions was proper. AR 17791. He concluded that the Division developed its reorganization plan properly. The Court finds that the MSPB Judge's conclusion was not arbitrary and capricious.

The MSPB Judge rejected Plaintiffs' claim that managers had an undue influence on the staffing plans and noted that there was a consensus decision-making process, with input from employees at all levels, in the development and implementation of the staffing plans.

The MSPB Judge also rejected Plaintiffs' arguments that the SMEs were unduly influenced by the managers, were not qualified, and improperly destroyed their notes. The MSPB Judge concluded that there was no evidence that the managers "could, or did, overwhelm the free will of the SMEs." AR 17793. He considered the testimony of numerous SMEs and concluded that they were "assertive and confident of their expertise, judgment and status." *Id.* The MSPB Judge determined that there is no support in law or regulations for Plaintiffs' argument that all of the SMEs' notes should have been preserved or that the SMEs' handwritten notes which were later reduced to formal record should have been preserved. The MSPB Judge's conclusions

were reasonable. *See Bureau of National Affairs, Inc. v. United States Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984) (finding that appointment calendars and telephone slips are not agency records under the Freedom of Information Act); *Judicial Watch Inc. v. Clinton*, 800 F. Supp. 1 (D.C.C. 1995) (personal staff notes are not agency records under the Freedom of Information Act). Plaintiffs cite no law to the contrary.

Lastly, the MSPB Judge considered the Division's procedures for determining competitive levels. The MSPB Judge noted that he did not find any evidence of a large scale conspiracy in developing competitive levels, which would have been necessary in order illegally to [*sic*] manipulate the Division's reorganization and RIF that affected thousands of people nationally. *See* AR 17795. John McGurk, former Human Resources Officer for the Division, testified that the competitive level system was revised to conform with the requirements of 5 C.F.R. § 351.403 (a)(2) and explained the process in detail. First, the Division asked employees to review their position descriptions and update them to reflect their current positions. The Division then modified competitive levels in accordance with the specific position descriptions filled out by the employees. Mr. McGurk explained that, thereafter, a panel of SMEs reviewed the employees' position descriptions, compared those position descriptions within the same competitive area for consistency, and then made RIF recommendations. *See* AR 15973. Finally, these recommendations were reviewed by the validation team: all branch managers, the RIF Coordinator and the classification specialists. *See* AR 15976-77.

The MSPB Judge also noted that the Division submitted its competitive level revision process, including its use of single position competitive levels, to the Office of Personnel Management (OPM) for its guidance. *See* AR 17796. OPM found that the use of single position competitive levels was appropriate. AR 17796.

Furthermore, the MSPB Judge noted that Dean Anderson, who served as a Supervisory Personnel Classification Specialist, explained the construction of narrow competitive levels for research scientists. According to Mr. Anderson, research science requires creativity and originality, and research scientists largely define their own career tracks through increasing specialization. He pointed out, "It is not surprising that there is limited interchangeability." AR 17797. Moreover, Mr. Anderson explained that "federal agencies who have a large number of research scientists have similar narrow competitive levels." AR 17797.

The MSPB Judge also determined that, under the pre-RIF system, over eighty-five percent of the competitive levels for scientist or researcher positions were single position levels. *See* AR 1779. Furthermore, he determined that pre-RIF positions designated for more than one person "generally only included a few other people." AR 17795. The MSPB Judge decided that the Division's procedures for determining competitive levels was proper, and his decision was not arbitrary and capricious.

Again, although Plaintiffs dispute the credibility of some of the witnesses, there is very little, if any, evidence in record supporting their assertions or undermining the "virtually unreviewable" discretion of the MSPB Judge to make decisions about credibility.

Hambsch v. Dept. of Treasury, 796 F.2d 430, 436 (Fed. Cir. 1986).

In sum, the MSPB Judge reasonably concluded that the Division had bona fide reasons for its reorganization. He reasonably decided that the Division properly developed and implemented the reorganization and RIF, and that the SMEs were independent and qualified, and were not required to retain their notes. He reasonably determined that the Division properly determined the competitive levels. He considered the correct laws and regulations. *See* 5 U.S.C. § 7703(c). There is substantial evidence in the record supporting his conclusions; his decision was not arbitrary and capricious. *See id.* Accordingly, the Court affirms the MSPB Judge's rulings on Plaintiffs' common claims.

D. Plaintiffs' Individual Claims

The Court has reviewed the MSPB Judge's decision regarding each Plaintiff and will not restate his rationale for all of the Plaintiffs' claims specific to their separation. Rather, the Court will address the claims raised by Plaintiffs in the aggregate and identify the evidence in support of the MSPB Judge's decision.

1. Exemption From RIF

Plaintiff Overshine alleged that he had a private agreement with the Agency that exempted him from the RIF. The MSPB Judge found no provision in the RIF regulations that allows a private agreement between an Agency official and an employee to exempt the employee from the RIF. Plaintiff Overshine has not cited such a regulation. Therefore, the MSPB Judge reasonably con-

cluded that Plaintiff Overshine was not exempt from the RIF.

2. Competitive Levels

Plaintiffs alleged that their competitive levels were improperly established.[3] As discussed above, the MSPB Judge rejected the Plaintiffs' generalized complaints of error regarding the Division's construction of the competitive level system. In addition, the MSPB Judge rejected each Plaintiff's individual claim that his or her own competitive level was too narrow and determined that all of these allegations failed as a matter of law for the following reasons: (1) other positions Plaintiffs argued should have been included in their competitive levels were in a different grade,[4] *see* C.F.R. § 351.403(a)(1) (competitive levels are made up of positions in the same grade), and (2) Plaintiffs were not correct in asserting that their competitive levels should include the same positions as the pre-1995 competitive level system,[5] and the duties of the positions Plaintiffs wanted to include in their competitive levels were too dissimilar,[6] *see* 5 C.F.R. § 351.403(a)(1) (competitive levels are made up of positions which are similar enough in duties). Some Plaintiffs also asserted that their competitive levels were established improperly because they were improperly discriminated against or retaliated against for discriminatory reasons. As discussed above, the Court will

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[3] The following Plaintiffs claimed that their competitive levels were too narrow: Adam, Adami, Calzia, Csejtey, Davis, Ford, Grantz, Hirshorn, Iyer, Lindh, Turrin and Wrucke.

[4] Plaintiffs Adam, Davis and Hirshorn.

[5] Plaintiffs Calzia, Ford and Wrucke.

[6] Plaintiffs Csjtey, Ford, Hirshorn, Iyer, Turrin and Wrucke.

not consider on this motion any of Plaintiffs' claims of discriminatory treatment.

3. Competitive Area

Plaintiff Adam alleged that his competitive area should have been the national program of the branch to which he was assigned rather than the regional unit and, therefore, his position should not have been abolished.

The MSPB Judge rejected this claim, finding that Plaintiff Adam's competitive area met the requirements of 5 C.F.R. § 351.402(b) because it consisted of "an activity under separate administration with the local commuting area." 5 C.F.R. § 351.402(b). The MSPB Judge was not incorrect in rejecting Plaintiff Adam's competitive area claim.

4. Transfer of Function To Another Competitive Area

Chapter 5 C.F.R. § 351.202 provides that when there is a transfer of any or all functions from one competitive area to another made in connection with a RIF, all employees whose functions were transferred must be transferred with their functions to the new competitive area. *See* 5 C.F.R. § 351.302.

The Code of Federal Regulations defines a transfer of function as the movement of work from one competitive area to another. *See* 5 C.F.R. § 351.203. A "function" is a clearly identifiable activity of the agency which consists of substantial authorities, powers, and duties authorized by law which combine to form a segment of the agency's mission. *See* 5 C.F.R. § 351.203; *see also Former Community Services Administration Employees v. Department of Health and Human Services*, 21

M.S.P.R. 257, 262 (1984). Section 151.301(b) provides that:

> In a transfer of function, the function must cease in the losing competitive area and continue in an identical form in the gaining competitive area (i.e. in the gaining competitive area, the function continues to be carried out by competing employees rather than by noncompeting employees).

5 C.F.R. § 351.301; *see also Hayes v. Department of Health and Human Services*, 829 F.2d 1092, 1096 (Fed. Cir. 1987); *Hasler v. Department of the Air Force*, 48 M.S.P.R. 207, 211 (1991). However, the movement of duties from one competitive area to another does not constitute a transfer of function. *Walsh v. Environment Protection Agency*, 25 M.S.P.R. 460, 465 (1984) (a transfer of function occurs when functions as opposed to duties are moved from one competitive area to another). In order to have a right to transfer with a function, an employee must show that the function was transferred to a different competitive area and that the entity that received the transfer was not already performing that function. *See* 5 C.F.R. § 203; *see also Hayes*, 829 F.2d at 1096 ("Under this regulation, a transfer of function occurs only when a function is transferred to another competitive area and the gaining area undertakes a class of activity it did not previously perform").

Some Plaintiffs allege that their positions were not abolished, but instead the functions of their positions were transferred to a different competitive area and, therefore, they should have been allowed to transfer to that area.[7] Defendant counters that no function was

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[7] Plaintiffs Adam, Calzia, Csejtey, Ford and Hirshorn.

transferred to an area where it did not previously exist and, therefore, that no transfers of function took place under 5 C.F.R. § 301.203.

The MSPB Judge found meritless all of Plaintiffs Adam, Calzia, Csejtey, Ford and Hirshorn's claims that the Division transferred the functions of their positions without transferring them, because in each case the function allegedly transferred previously existed in the transferee competitive area. Therefore, the MSPB Judge reasonably concluded that the Division did not transfer the function of these Plaintiffs' positions without allowing them to transfer, and that Plaintiffs Adam, Calzia, Csejtey and Ford had no right to transfer with the duties of their positions.

5. The Division's Bump and Retreat Policy

Chapter 5 C.F.R. § 351.701 provides [*sic*] the "bump and retreat" standard applied [*sic*] when a federal agency conducts a RIF. Section 351.701 requires that the retreating employee be qualified for the retreat position, be in the same competitive area as the retreat position, have the same work schedule as the retreat position, and retreat to the same or essentially same position as he or she held before. *See* 5 C.F.R. § 351.701(a) and (c)(3); *Parkhurst v. Department of Transportation*, 70 M.S.P.R. 309, 311 (1996). Furthermore, under 5 C.F.R. § 351.701(b), the retreating employee can bump "another employee in a lower tenure group" as long as that person is "no more than three grades below" the released position. 5 C.F.R. § 351.701(b).

Sixteen of the Plaintiffs claim that the Division should have allowed them to "retreat" into another posi-

tion instead of separating them from federal service.[8] *See* Pl.s' First Amended Complaint, 7. Plaintiff Overshine also claims that he was improperly bumped from his position by Dr. Piper.

The MSPB Judge concluded that the Division's actions were proper under § 351.701 with regard to Plaintiffs' alleged bump and retreat violations. The MSPB Judge found that there were justifiable reasons specific to each Plaintiff as to why he or she could not retreat into other positions. These reasons included that: 1) some Plaintiffs wanted to retreat to a position that was not "essentially identical" to the released positions,[9] 2) some Plaintiffs were not qualified to assume the duties of the retreat position without undue interruption,[10] 3) some Plaintiffs' released positions were lower in standing than the positions to which they wanted to retreat,[11] 4) some Plaintiffs' released positions were not the same type of work schedule (e.g., full-time, part-time, seasonal, etc.) as the position to which they wanted to retreat,[12] 5) some Plaintiffs wanted to retreat to va-

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[8] Plaintiffs alleging bump and retreat violations are: Adam, Adami, Calzia, Csejtey, Davis, Drinkwater, Ford, Grantz, Hirshorn, Iyer, King, Lewis, Lindh, Overshine, Turrin and Wrucke.

[9] The MSPB Judge found this rationale barred bump and retreat for each of the following Plaintiffs: Adam, Adami, Csejtey, Davis, Drinkwater, Ford, Grantz, Iyer, King, Hirshorn, Lewis and Turrin.

[10] The MSPB Judge found this rationale barred bump and retreat for each of the following Plaintiffs: Calzia, Csejtey, Davis, Drinkwater, Ford, Hirshorn, Iyer, King, Lewis, Turrin and Wrucke .

[11] The MSPB Judge found this rationale barred bump and retreat for Plaintiffs Adam and Calzia.

[12] The MSPB Judge found this rationale barred bump and retreat for the following Plaintiffs: Calzia, Lewis and Lindh.

cant positions that the Division did not plan to fill[13] and 6) one Plaintiff was properly bumped from his position.[14]

First, in determining whether a position was "essentially identical," the MSPB Judge reasonably found that a "position is essentially identical to one previously held if the two positions would properly be placed in the same competitive level." AR 17803. *See Parkhurst*, 70 M.S.P.R. at 312. In *Parkhurst*, the MSPB Judge laid out the criteria for determining when a released position is "essentially identical" to the position retreated to and the standard for determining whether two positions should be in the same competitive level. *Id.* First, the *Parkhurst* MSPB Judge held that the competitive level determination "depends on the duties and qualifications set forth in the position descriptions." *Id.* Furthermore, in *Parkhurst*, the MSPB Judge found that "positions belong in the same competitive level if they are in the same grade and classification series, and are similar enough in duties, qualification requirements, pay schedules, and working conditions so that the incumbent of one position could successfully perform the critical elements of any other position upon entry into it without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee." *Id.* Here, the MSPB Judge held that where the released position and the retreat position were not "essentially identical," retreat is prohibited. Therefore, because the MSPB Judge determined that each of the nine

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[13] The MSPB Judge found this rationale barred bump and retreat for each of the following Plaintiffs: Adam, Grantz, Lewis, Overshine and Turrin.

[14] The MSPB Judge found that Plaintiff Overshine was properly bumped.

Plaintiffs alleging a right to retreat was released from a position that was not "essentially identical" to the position to which he or she wanted to retreat, the MSPB Judge reasonably concluded that these Plaintiffs have no right to retreat.

Second, the MSPB Judge properly relied on Chapter 5 C.F.R. § 351.702(a)(1)-(4) in determining whether Plaintiffs were qualified to assume other positions without undue interruption. In order to retreat to a position, § 351.702(a)(1)-(4) provides that the employee must meet the following requirements:

(1) meets the OPM standards and requirements for the position,

(2) is physically qualified, with reasonable accommodation where appropriate, to perform the duties of the position,

(3) meets any special qualifying condition which the OPM has approved for the position, and

(4) has the capacity, adaptability, and special skills needed to satisfactorily perform the duties of the position without undue interruption. This determination includes recency of experience, when appropriate.

5 C.F.R. § 351.702(a)(1) -(4). *See Vigil v. Department of the Army*, 63 M.S.P.R. 384, 388 (1994). In defining "undue interruption," the MSPB Judge relied on the criteria set forth in *Porter v. Department of Commerce*, 13 M.S.P.R. 177, 180-81 (1982). *Porter* held that undue interruption "is a degree of interruption that would prevent the completion of required work within the allowable limits of time and quality." *Id.* The *Porter* MSPB

Judge held that "it naturally follows that any finding of undue interruption must be related directly to the nature of the particular work program to be affected. Depending upon the pressures of priorities, deadlines, and other demands, the ordinary work program probably would not be unduly interrupted if optimum quality and quantity of work were not regained within 90 days after a reduction in force." 13 M.S.P.R. at 179-80. Furthermore, the Division also may consider whether the displacement of an incumbent by retreat of another employee into his or her position would cause undue interruption. *See La Prade v. Department of Transportation*, 27 M.S.P.R. 277, 283 (1985) (finding that "an otherwise qualified employee is not entitled to exercise assignment rights to an incumbered position if the displacement would result in undue interruption").

Here, the MSPB Judge concluded that each Plaintiff claiming a right to retreat to another position was not qualified to assume that position without undue interruption. The MSPB Judge relied on the testimony of expert witnesses and some of these Plaintiffs' supervisors, and considered each of these Plaintiffs' prior work experience as compared to the required skill and knowledge of the alternative position. *See La Prade*, 27 M.S.P.R. at 283. Substantial evidence supports the MSPB Judge's conclusion that Plaintiffs could not have retreated to other positions without undue interruption.

Third, the MSPB Judge properly concluded that 5 U.S.C. § 351.701 prohibits the retreat of an employee to a position with a higher retention level. Section 351.701 states that "an agency shall offer assignment, rather than furlough or separate, in accordance with paragraphs (b), (c) and (d) of this section." 5 C.F.R. §

351.701. These paragraphs provide, respectively, (1) the requirements for bumping "another employee in a lower subgroup but the same tenure group," (2) the requirements for retreating to a "position held by another employee with lower retention standing in the same tenure group or subgroup," and (3) the limitations on these processes. 5 C.F.R. § 351.701 (b), (c) and (d). These sections require that the released employee may retreat only to a position held by another employee that "is no more than three grades . . . below the position from which the employee was released . . . " *Id.* Therefore, Plaintiffs Adam and Calzia's request to retreat to a position of higher retention level was properly denied.

Fourth, the MSPB Judge properly concluded that § 351.701 prohibits the retreat of an employee to a position that does not include "the same type of work schedule." 5 C.F.R. 351.701(a). Therefore, Plaintiffs Calzia, Lewis and Lindh's request to retreat to a position with a different work schedule was properly denied.

Fifth, the MSPB Judge was correct that an employee may not retreat to a position that the Division has decided to leave vacant. Pursuant to Chapter 5 C.F.R. § 351.201(b), an agency is not required to fill a vacant position. Therefore, Plaintiffs Adam, Grantz, Lewis, Overshine and Turrin's requests to retreat to vacant positions were properly denied.

Lastly, the MSPB Judge reasonably concluded that Dr. Piper was qualified pursuant to 5 C.F.R. § 351.701(a) and (b) to bump Plaintiff Overshine from his GS-15 position.

The Court finds that there is substantial evidence to support the MSPB Judge's decisions with regard to the

bump and retreat claims of each of the individual Plaintiffs who made such claims.

E. Post-RIF Claims

Some Plaintiffs claim that Defendant failed to consider them for any vacant positions which were filled after the RIF. It is not clear whether Plaintiffs allege that Defendant violated the CSRA or discriminated against them, or both, by failing to consider them for vacant positions which were filled after the RIF.

If Plaintiffs are alleging that Defendant violated the CSRA by failing to consider them for positions filled after the RIF, the Court finds this argument to be unsubstantiated and unpersuasive. Plaintiffs do not assert that they sought out a particular position and Defendant failed to consider them. Rather, Plaintiffs assert that Defendant failed to notify them that there were positions being filled after the RIF and, therefore, failed to consider them for those positions. Plaintiffs fail to cite any law or regulation that requires a federal agency to notify a former employee who was separated during a RIF of a vacant position being filled after the RIF. Further, Plaintiffs fail to establish that any of the Plaintiffs brought a claim before the MSPB that the Division failed to consider them for a position after the RIF. Therefore, Plaintiffs' claims that Defendant violated the CSRA by failing to notify them of and consider them for positions that were filled after the RIF fails. If Plaintiffs claim that Defendant unlawfully discriminated against them by failing to notify them of or consider them for positions that were filled after the RIF, the Court will not consider such claims on this motion.

II. Motion to Dismiss Plaintiff Hirshorn and Turrin's Claims For Lack of Jurisdiction.

Defendant moves to dismiss Plaintiffs Hirshorn and Turrin's claims for lack of jurisdiction. Defendant does not specify the procedural basis for its motion to dismiss. The Court therefore treats this motion as a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Defendant claims that Plaintiffs Hirshorn and Turrin, unlike the other Plaintiffs, did not allege discrimination claims in the proceedings before the MSPB. However, these Plaintiffs did allege that the Division retaliated against them in conducting the RIF. Therefore, the Court has jurisdiction over these claims. *See* 5 U.S.C. § 7703(c); *cf Hays v. Postmaster General of the United States*, 868 F.2d 328, 329 (9th Cir. 1989) (finding that "the district court did not have jurisdiction over discrimination claims that were not raised before the MSPB at any stage of the proceeding"). Summary judgment on Plaintiffs' retaliation claims is not being considered on this motion.

III. Plaintiff Mann's Allegations

Defendant argues that Plaintiff Mann's claims regarding the RIF are barred by a March 7, 1997 settlement agreement, and that his claims that after the RIF the Division violated the CSRA by failing to consider him for vacant positions are barred because he failed to exhaust his administrative remedies pursuant to 5 U.S.C. § 7702.

Plaintiff Mann has not alleged that the Division conducted the RIF in violation of the CSRA. If he had, the allegations would be barred by the settlement agreement.

Rather, Plaintiff Mann's claims are based on actions taken against him after he was rehired. Specifically, Plaintiff Mann claims that after he was rehired, he applied for vacant positions for which he was qualified and, in violation of the CSRA, Defendant failed to consider him or canceled the position for which he had applied. Plaintiff Mann also alleges that after he was rehired, he was subjected to ridicule and retaliated against for protected activity.

Plaintiff Mann's claim for violation of the CSRA after he was rehired is barred because he failed to seek review with the MSPB in accordance with 5 U.S.C. § 7701 *et seq.* prior to filing this lawsuit. *See Romain*, 799 F.2d at 1421. As explained above, Plaintiff Mann's retaliation claim will not be addressed on this motion.

IV. Plaintiffs' Rule 56(f) Request

Plaintiffs allege that Defendant's motion for summary judgment is premature because it is not adequately substantiated by the evidence and because there has been little meaningful discovery conducted. Therefore, Plaintiffs assert that Defendant's motion for summary judgment should be denied until they have sufficient time to conduct discovery.

Defendant filed her motion for partial summary judgment on January 18, 2000. Pursuant to stipulation of the parties, Plaintiffs' opposition to Defendant's motion was to be filed on April 21, 2000. Plaintiffs did not

submit their opposition on April 21, 2000. Instead, on April 28, 2000, Plaintiffs filed an *ex parte* application for permission to file a Rule 56(f) motion, stating that Plaintiffs' counsel had been occupied with competing commitments and had experienced technical problems with her computer equipment. The Court denied Plaintiffs permission to file a Rule 56(f) motion and granted them a three week extension to file an opposition to Defendant's motion for summary judgment and a motion for further discovery, if necessary, to oppose the motion. The Court also advised Plaintiff that Rule 56(f) requires the moving party to state reasons why they couldn't "present by affidavit facts essential to justify the party's opposition," and state facts they hope to discover. Fed. R. Civ. P. 56(f); *see* May 4, 2000 Order.

"[T]he party seeking a continuance bears the burden to show what specific facts it hopes to discover that will raise an issue of material fact. The mere hope that further evidence may develop prior to trial is an insufficient basis for a continuance under Federal Rule of Civil Procedure 56(f)." *Continental Maritime of San Francisco v. Pacific Coast Metal Trades Dist. Council, Metal Trades Dep't. AFL-CIO*, 817 F.2d 1391, 1395 (9th Cir. 1987) (internal citation omitted). To obtain a continuance, the party opposing the summary judgment motion must make clear not only what information is sought, but also how that information "would preclude summary judgment." *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998) (quoting *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987)).

Plaintiffs' claim that they are entitled to relief pursuant to Rule 56(f) is unsubstantiated. First, Plaintiffs have not explained why further discovery is necessary,

in view of the fact that the Court must rely on the administrative record in reviewing a MSPB Judge's decision on non-discrimination issues. Because Defendant's motion for partial summary judgment solely addresses the non-discrimination issues, this Court need not look beyond the administrative record that was before the MSPB Judge below.

Next, Plaintiffs' reliance on Magistrate Judge LaPorte's December 30, 1998 Order, which limited discovery to that necessary to bring and oppose a class certification motion, is mistaken because the December 30, 1998 Order expired long before Plaintiffs' deadline for filing their opposition to Defendant's motion for partial summary judgment. Moreover, Judge LaPorte's May 19, 1999 Order states, "The parties shall meet in person to discuss discovery and case management issues in this case and, by June 22, 1999 shall file a Joint Case Management Conference Statement outlining any issues that may be in dispute." Plaintiffs have failed to present evidence that they attempted to conduct discovery after Judge LaPorte's May 19, 1999 Order. Rather, Defendant alleges that Plaintiffs have not filed any discovery requests since January, 1999.

Lastly, even if additional discovery were necessary, Plaintiffs have failed to present specific facts they hope to discover that will raise an issue of material factual dispute. Therefore, Plaintiffs have failed to demonstrate that they are entitled to relief pursuant to Rule 56(f).

Furthermore, Plaintiffs also argue that they should be granted relief under Rule 56(f) because they have requested, to no avail, an electronic copy of the 175 volume administrative record from Defendant. However, this argument is moot because Plaintiffs' motion to com-

pel an electronic copy of the administrative record was granted in part and denied in part in the December 21, 2000 Order by Judge LaPorte.

V. Motions To Strike

Plaintiffs move to strike all references in Defendant's motion for partial summary judgment to the MSPB Judge's hearing decision, claiming that these references are not to admissible evidence. Defendant moves to strike unsupported factual references in the pleadings and declarations filed by Plaintiffs in their opposition and surreply to Defendant's motion for partial summary judgment.

Plaintiffs' and Defendant's motions to strike are both voluminous. However, although neither is entirely without merit, the Court, having considered the parties' motions to strike, finds that neither party has moved to strike evidence that both is inadmissible and necessary to the Court's disposition of Defendant's motion for partial summary judgment. The Court therefore does not offer a point-by-point analysis of the merits of the parties' motions to strike. To the extent that this order cites and relies upon evidence to which a party has moved to strike, that party's motion is denied on the merits. To the extent that a party has moved to strike evidence that is not necessary to the Court's disposition of this order, that party's objection or motion is denied as moot.

CONCLUSION

For the foregoing reasons, Defendant's Revised Motion For Partial Summary Judgment (Docket #83) is GRANTED and her Motion to Dismiss Plaintiffs Hirshorn and Turrin's claims (Docket #83) is DENIED. Defendant's Motion For Partial Summary Judgment on the CSRA Claim Regarding Adam (Docket # 52) is DENIED as moot, having been superseded by this revised motion. Defendant's motions to strike (Docket ## 102 and 111) are DENIED. Plaintiffs' Cross-Motion For Summary Judgment (Docket #63), Motion for Relief Pursuant to Rule 56(f)(Docket #63), and Motion To strike Defendant's Evidence (Docket #93) are DENIED.

Dated: [MAY 17, 2001] /s/ ILLEGIBLE
CLAUDIA WILKEN
United States District
Judge

Copies mailed to counsel
as noted on the following page

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case Number: 4:98-cv-02094

ADAM

v.

BABBITT

[May 17, 2001]

*** * CERTIFICATE OF SERVICE * ***

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 17, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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RICHARD W. WIEKING, CLERK

BY: /s/ ILLEGIBLE
DEPUTY CLERK